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ALEXANDER L. STEVAS,

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THOMAS P. VANN and
JAMES E. MELHORN

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MURRAY S. MONROE
Counsel of Record

William J. Seitz
TAFT, STETTINIUS & HOLLISTER
1800 First National Bank Center
425 Walnut Street
Cincinnati, Ohio 45202
(513) 381-2838
Attorneys for Petitioner Vann

ROBERT W. RITCHIE
Counsel of Record

John E. Eldridge
RITCHIE, CHADWELL & ELDRIDGE
1130 Park National Bank Building
Knoxville, Tennessee 37902
(615) 637-0661
Attorneys for Petitioner Melhorn

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

QUESTIONS PRESENTED

1. May the Sixth Circuit disregard the confrontation clause as interpreted in *Ohio* v. *Roberts*, 448 U.S. 56 (1980), and as properly applied in *United States* v. *Gibbs*, 703 F.2d 683 (3rd Cir. 1983) so as to permit the Government to prove a substantial part of a conspiracy charge through the testimony of co-conspirators who were neither produced at trial nor shown to be unavailable for cross-examination?

2. In the face of the express prohibition in Federal Rule of Evidence 404(b) against the use of prior offenses to prove propensity to commit the offense charged, may an appellate court, in a *per se* Sherman Act bid rigging case under § 1 of the Sherman Act (15 U.S.C. § 1) sanction the admission of testimony as to six uncharged bid rigging occurrences which are ostensibly introduced to show that the defendants had the basic intent to agree to the charged offense under circumstances in which:

a) the district court expressly ruled that such evidence was *inadmissible* for that purpose as tending to prove only the propensity of the defendants to conspire:

b) basic intent to agree is necessarily inferable from proof of the charged act of conspiring;

c) the defendants did not genuinely dispute that they possessed that intent; and

d) the effect of the ruling is to make uncharged Sherman Act offenses admissible in all *per se* criminal antitrust cases?

3. May a district court, believing that the elevated intent standards of *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978) apply to a *per se* illegal antitrust offense, decide *sua sponte* that bad act evidence is admissible to show that elevated intent and then fail correctly to instruct the jury as to the elevated intent standards of *Gypsum*?

4. Does the Sixth Amendment right to consult with counsel terminate at the district court level and permit an appellate court to continue with an appeal when the accused has become incapacitated to the point that he can neither think nor communicate with counsel?

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IN THE

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No. ————

THOMAS P. VANN and
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Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners Thomas P. Vann and James E. Melhorn respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on March 8, 1983.

OPINIONS BELOW

The District Court wrote no opinion on the issues submitted here. The Court of Appeals' opinion on the merits is unpublished, the Government's request for publication of same having been denied. The Court of Appeals' order denying Petitioners' request for a continuance until such time as Petitioner Vann could consult with counsel is also unpublished.

JURISDICTION

The Sixth Circuit's judgment was dated March 8, 1983. The order denying rehearing and rehearing *en banc* was dated May 13, 1983. Jurisdiction is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

U.S. Constitution Amendment VI

15 U.S.C. § 1 ("Sherman Act § 1")

28 U.S.C. Federal Rule of Evidence 404(b) ("F.R.E. (404(b)")

28 U.S.C. Federal Rule of Evidence 801(d)(2)(E) ("F.R.E. 801(d)(2)(E)")

These provisions are set forth in pertinent part at App. 36a.

STATEMENT OF THE CASE

I. Proceedings In The District Court

In February, 1981, Petitioners Vann and Melhorn were indicted for violating Section 1 of the Sherman Act. The indictment charged that Petitioners, who were mid-level management figures in a highway construction company, had entered into an agreement to allocate to their employer Contract 8148, let by the State of Tennessee on May 18, 1979, and to allocate to a competitor, Interstate Paving Company ("Interstate"), Contract 8175, which was let in June, 1979 and relet in September, 1979.

Citing the need to hold the Government's "feet to the fire in terms of making the proof conform to the indictment", the District Court ordered the Government to provide an involuntary Bill of Particulars ("Bill"). The Bill specified that there were 23 co-conspirators, ten sub-agreements of the charged conspiracy, and 105 overt acts taken in furtherance of the conspiracy.

At the trial, the Government called only five of the 23 co-conspirators to testify. Petitioners called several defense witnesses, but did not themselves testify. Petitioners' defense was simply that they had not agreed to the conspiracy charged in the indictment. Petitioners conceded that they knew and met with various co-conspirators. However, Petitioners in-

sisted that the charged agreement had not been proved, pointing to, *inter alia*:

1. testimony from the Government's own star witnesses that indicated that there was no agreement since a number of preconditions had never been satisfied;

2. testimony that the submitted bids on Contract 8148 were *all below* the State's own job cost estimate, and from all appearances not rigged; and

3. testimony that at least one other contractor was told by an Interstate executive that Contract 8148 was *not* rigged.

The jury deliberated over a three day period. It twice indicated its inability to reach a verdict before it finally returned guilty verdicts.

II. Facts Pertinent To Confrontation Clause Issue

The Bill identified executives of Malone Brothers Construction Co. ("Malone") and Pendleton Construction Co. ("Pendleton") as co-conspirators. Of the ten sub-agreements specified in the Bill, four were with Malone and Pendleton.

At trial, over objection, the Government's witness, Fugate, was permitted to testify as to statements made by Malone and Pendleton. The statements were admitted for their truth under F.R.E. 801(d)(2)(E). No effort was made either to produce or to demonstrate the unavailability of either witness – a fact the District Court conceded. App. 19a. The Government made *no effort* to show that the challenged statements were only of peripheral importance or that there would be no utility to confrontation of those witnesses. The Court ruled that satisfaction of F.R.E. 801(d)(2)(E) automatically satisfied the strictures of the Confrontation Clause and invited Petitioners to "take this to the Supreme Court and let them bite the bullet between the federal rules of evidence and the confrontation clause." App. 18a.

The statements of unconfronted witnesses Malone and Pendleton constituted substantially all the proof as to 40% of the Government's case. The prosecutors relied on these statements to urge conviction of Petitioners. Pendleton's statements concerned the only occasion when either Peti-

tioner discussed Contract 8175 with any competitor other than Interstate Paving's personnel. The testimony of the only five co-conspirators to testify in person was thus augmented by the testimony of these two unconfronted co-conspirators.

III. Facts Pertinent To Bad Act Evidence Issues

Mid-way through the Government's case in chief, and with no prior notice in the Bill or otherwise, the Court allowed the Government to introduce evidence as to Petitioners' alleged involvement in *six* uncharged bid-riggings. This included the testimony of one surprise witness and also testimony by one Mr. Pope – an admitted perjurer. Pope testified that he participated with Petitioners in rigging another bid some years before, but the job he described did not exist, he could not recall the year, and his company was ineligible to bid the job. In a post-verdict juror interview, the juror pointed to this prior bad act testimony as one of the main factors resulting in the verdict.

The admission of the prior bad act testimony followed cross-examination of the Government's two star witnesses, Riddle and Fugate, which elicited that their discussions with Petitioners about rigging contracts 8148 and 8175 had been conditioned on contacting everyone on the bidders list (or at least the major perceived "threats" to the job).* They admitted that this was never done. They further admitted that Petitioners were either not present, or merely present, at various meetings and during various other contacts. Petitioners made clear to the Court that the cross-examination was simply to show that no agreement was made, regardless of what the several parties had hoped to accomplish. (E.g., App. 24a-26a)

Over objection, the District Court initially permitted the first two "bad act" witnesses to testify on the theory that the

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* They also admitted that it was industry custom that one cannot have an agreement to allocate a job unless all the major proposalholders go along, because absent such concurrence, everyone bids "the hard way" (competitively). They admitted that the low bids on 8148 reflected "hard way" bidding.

other bid-riggings were admissible to show Petitioners' intent to agree to the charged offense. However, before the third "bad act" witness testified, the Court reconsidered. It decided that the bad act testimony was *inadmissible* on the issue of Petitioners' basic intent to agree. The Court's ruling was premised upon a reasoned application of F.R.E. 404(b) to the elements of a Sherman Act criminal case:

> If [bad act evidence is admitted] on the intent to agree, that gets to whether or not there is an agreement, and an agreement is the essence of a crime. That gets awful close to [the forbidden use of bad act evidence that] . . . commission of a prior offense is the equivalent of the commission of this offense or that the defendants acted in conformity with the previous conduct. App. 21a.

The District Court understood that the basic intent to agree would follow as a necessary inference from proof of the only act – agreement – proscribed by the Sherman Act. It therefore reasoned that it was both unnecessary to resort to prior acts and prejudicial to do so, because such would be a forbidden use of prior conduct to prove that the accused acted in conformity with that conduct. App. 21a-22a, 28a-29a.

The Government's reaction to the District Court's new position was to admit that it wanted to use the bad acts to prove that Petitioners "did in fact have that intent to agree *and did agree*" App. 27a, (emphasis added). Unpersuaded by the Government's admission, the District Court twice gave a cautionary instruction informing the jury that it must find that Petitioners intended to agree and did agree to the charged offense by evidence *other than* the bad act evidence. App. 19a-21a.

Nevertheless, the District Court permitted the third bad act witness to testify, and instructed the jury to consider all of the bad act evidence, on the issue of whether Petitioners acted with knowledge of the probable anticompetitive consequences of their conduct. App. 19a-21a, 29a-30a. The District Court's ruling flowed from its belief that even in *per se* antitrust offenses such as bid-rigging, a conviction must rest upon proof not only that the accused intended to agree to a *per*

se illegal offense, but also that the accused possessed an intent to effectuate the object of the conspiracy ("elevated intent").* The District Court, in short, believed that this Court's rulings in *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 444 & n. 21 (1978), mandated that the Government prove, by evidence that Petitioners acted with knowledge of the probable anticompetitive consequences of their conduct, that Petitioners intended a restraint of trade. Both the Government and Petitioners disagreed with this conclusion, at least to the extent that "elevated intent" could be used as a basis to admit bad act evidence.

Having submitted the bad act evidence on the "elevated intent" issue as described in *Gypsum*, the District Court's final charge instructed the jury to find that "the element of intent is supplied by proof beyond a reasonable doubt that the defendant knew the probable anticompetitive effect of the agreement." That instruction, however, failed also to state that under *Gypsum*, 438 U.S. at 444 & n. 21, the jury must first find that anticompetitive effects resulted and that absent such a finding, the jury must find that the defendants acted with the conscious object of producing a restraint of trade.

IV. Preliminary Proceedings In The Sixth Circuit

A. The Denial Of Petitioner Vann's Sixth Amendent Rights

Just before the Government's Brief was received, on November 11, 1982 Petitioner Vann suffered a severe heart attack and complications resulting in severe brain injury. At all times since then he has been in the "prolonged vegetative state." Vann's counsel's request for a continuance of oral argument, supported by letters from Vann's neurosurgeon

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* Petitioners herein use "elevated intent" to describe any level of intent beyond the basic intent to agree, *i.e.* as used here, the term includes both of the standards which this Court explicated in its *United States Gypsum* opinion as being alternate methods of satisfying the "intent to effectuate objective" requirement which applies in some Sherman Act criminal cases. *See* notes 1, 55, *infra*.

and clinical data, was denied on February 17, 1983 on the grounds that argument could proceed without consultation with the client because appellate counsel was also trial counsel. App. 10a. Mr. Vann thus had no opportunity to review the Government's Brief, to consult with counsel on the Reply Brief, to assist counsel in rebutting arguments first raised on appeal by the Government, or to assist counsel in preparation for oral argument.

B. The Denial Of Petitioners' Motion To Supplement The Record or Strike Parts Of The Government's Brief.

In its brief on appeal the Government argued for the first time that its failure to produce or demonstrate the unavailability of Messrs. Malone and Pendleton was excused because the evidence was extremely reliable, not crucial to the Government and not devastating to Defendants. This is to be contrasted with the Government's argument below that satisfaction of F.R.E. 801(d)(2)(E) automatically satisfies the Confrontation Clause and that a showing of unavailability was unnecessary. (App. 16a-17a) This "excuse" was never raised below, the record is barren on the issue, the District Court did not consider it, and Petitioners had no opportunity to meet it. Thus, in the Sixth Circuit Petitioners sought to show that any exception to the Government's Sixth Amendment duty to show the absent declarants' unavailability was inapplicable because grand jury transcripts provided to Petitioners (but not part of the trial record) demonstrated the potential utility of cross-examination. Alternatively, Petitioners asked the Court of Appeals not to consider this new argument and to strike those parts of the Government's Brief which raised it. The Sixth Circuit denied both branches of Petitioners' motion, by order dated Jan. 13, 1982 (App. 9a).

V. The Sixth Circuit's Opinion On The Merits

Sixth Circuit Judges Kennedy and Martin, and District Judge Harvey, affirmed the convictions in a not-for-publication order dated March 8, 1983. The Government's request that the order be published was denied by order dated March

24. Petitioners' timely petition for rehearing, with suggestion for rehearing *en banc*, was denied on May 13, 1983.

A. Confrontation Clause Issue

In its opinion on the merits, the Sixth Circuit panel decided that it "need not intimate a view" on the Confrontation Clause implications of the admission of evidence under F.R.E. 801(d)(2)(E) when the declarant is not first shown to be unavailable. Without any explanation of its reasons, the Sixth Circuit simply held that

> whether applying the rule that evidence admitted under the federal co-conspirator exception automatically complies with the requirements of the confrontation clause, or the rule that the declarant must be unavailable, unless the evidence is neither crucial to the prosecutor nor devastating to the defendant, the testimony in dispute is admissible. App. 8a.

Sub silentio, the Sixth Circuit found without benefit of a record that the evidence was neither crucial nor devastating.

B. Bad Act Evidence Issues

On appeal, both sides agreed that the elevated intent standards articulated in *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 444 & n. 21 (1978), did not apply to a *per se* antitrust case and that bad act evidence should not be admitted, as the District Court had done, to show such intent. Because of this concession by the parties, the Sixth Circuit never addressed the "elevated intent" issue, which was the basis upon which the evidence actually was submitted to the jury. Instead, the Sixth Circuit held that the evidence could have been admitted to "prove the basic 'intent to agree' element of a criminal antitrust offense",[1] which

[1] App. 6a. In *Gypsum*, 438 U.S. at 443 & n. 20, this Court fleetingly described the "basic intent to agree" element as the intent "which is necessary to establish the existence of the conspiracy", but went on to focus on whether some Sherman Act criminal cases also ought to require proof that the conspirators intended to effectuate the object of the conspiracy.

was the very basis *expressly rejected* by the District Court.

The panel recognized that bad act evidence is inadmissible under F.R.E. 404(b)'s "intent" exception where the requisite criminal "intent is inferable if the proscribed act is proven and defendant does not claim mistake or inadvertance". App. 6a, *quoting United States* v. *Ring*, 513 F.2d 1001, 1009 (6th Cir. 1975). However, the panel tersely concluded that the evidence was admissible to show basic intent to agree:

> During their trials, appellants argued that while they had attended some meetings at which the rigging of contracts 8148 and 8175 was discussed, they were 'merely present' and never agreed to participate in the conspiracy. By asserting this 'mere presence' or 'lack of agreement' defense, appellants put intent to agree in issue. App. 6a.

The panel failed to address the fact that the District Court had concluded that the bad act evidence was *inadmissible* to show basic intent to agree. Moreover, it relied on the District Court's *later-recanted* finding that the evidence was more probative than prejudicial on that score. The panel thus substituted its discretion for that entrusted to the District Court, which discretion the District Court had *ultimately* exercised by ruling that use of the evidence to show "intent to agree" was tantamount to proving one conspiracy by resort to evidence of prior conspiracies. In short, the District Court's ruling that the evidence was inadmissible to prove intent to agree was reversed, and the District Court's ruling that the evidence was admissible on the elevated intent standards set forth in *Gypsum* was not considered.

REASONS FOR GRANTING THE WRIT

I. THE SIXTH CIRCUIT'S WILLINGNESS TO PERMIT THE INTRODUCTION OF CO-CONSPIRATOR STATEMENTS TO PROVE SUBSTANTIAL PARTS OF THE CHARGED OFFENSE, WHERE THE DECLARANTS ARE NEITHER PRODUCED NOR SHOWN TO BE UNAVAILABLE, SQUARELY CONFLICTS WITH THE

THIRD CIRCUIT'S POSITION ON THIS ISSUE AND IS IN COMPLETE DEROGATION OF THIS COURT'S DECISION IN OHIO v. ROBERTS

This Court's most recent discussion[2] of the interface between the Federal Rules of Evidence and the Confrontation Clause identified two seminal restrictions placed by the Confrontation Clause on the use of out-of-court statements in criminal trials. While not purporting to resolve all of the facets of the interface, *Ohio* v. *Roberts*, 448 U.S. 56 (1980) mandated that the analysis must follow from a two-step approach in which the prosecution must show that the evidence is both "necessary" and "reliable."[3] *Roberts* stated that in order to satisfy the necessity requirement, the prosecution must "either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant."[4] A footnote in *Roberts* referred to the Court's prior, plurality decision in *Dutton* v. *Evans*, 400 U.S. 74 (1970). In this note, *Roberts* suggested that a "demonstration of unavailability is not always required" under circumstances where "the utility of trial confrontation" is as "remote" as it was in *Dutton*.[5] At trial here, however, the Government failed to do anything whatsoever either in satisfaction[6] or excuse of the *Roberts* necessity requirement.

In *Roberts'* aftermath, decisions in four circuits have properly employed its two-track analysis to test against the Confrontation Clause the admission of co-conspirator statements.[7]

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[2] *Ohio* v. *Roberts*, 448 U.S. 56 (1980).

[3] 448 U.S. at 65.

[4] *Id.*

[5] *Id.* at n. 7.

[6] Under principles established in *Barber* v. *Page*, 390 U.S. 719, 725 (1968) and reaffirmed in *Roberts*, 448 U.S. at 74, the prosecutor's duty to show a declarant's unavailability is discharged only when an unsuccessful "good faith effort is made to obtain his presence at trial." The Government has never contested that it made no effort at all to bring Pendleton or Malone to the trial.

[7] *United States* v. *Gibbs*, 703 F.2d 683, 690-692 (3rd Cir. 1983); *United States* v. *Fleishman*, 684 F.2d 1329, 1338-1339 (9th Cir.), *cert. denied*, 103 S.Ct. 464 (1982); *Steele* v. *Taylor*, 684 F.2d 1193,

These cases recognized that evidence admissible under F.R.E. 801(d)(2)(E) does *not* automatically guarantee compliance with the Confrontation Clause.[8] Because the Sixth Circuit's decision here rested in part upon the view that "evidence admitted under the federal co-conspirator exception automatically complies with the requirements of the Confrontation Clause" (App. 8a), certiorari should be granted to inter this reasoning which conflicts with that of the Third, Fifth, and Ninth Circuits, (and with another decision in the Sixth), and which reduces *Ohio* v. *Roberts* to a nullity in criminal conspiracy cases.

While virtually all[9] of the appellate court decisions applying *Ohio* v. *Roberts* to analyze challenges to co-conspirator testimony have dealt only with contentions that the "reliability" prong of *Roberts* was not satisfied,[10] the precise

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1200-1201 (6th Cir. 1982), *cert. denied*, 103 S.Ct. 1501 (1983); *United States* v. *Perez*, 658 F.2d 654, 660-661 (9th Cir. 1981); *United States* v. *Peacock*, 654 F.2d 339, 349 (5th Cir. 1981); *United States* v. *Fielding*, 630 F.2d 1357, 1366-1367 (9th Cir. 1980), *reh. denied and amended*, 645 F.2d 719 (9th Cir. 1981). *Cf.*, *United States* v. *Barlow*, 693 F.2d 954, 964 & n. 10 (6th Cir. 1982); *Lenza* v. *Wyrick*, 665 F.2d 804, 811 (8th Cir. 1981).

[8] *E.g.*, *United States* v. *Gibbs*, 703 F.2d at 691: "We therefore believe that the Confrontation Clause and the evidentiary question must be separately analyzed, and that the Sixth Amendment may require the exclusion of evidence even though admissible under Fed. R. Evid. 801(d)(2)(E)."

[9] *But see*, *Steele* v. *Taylor*, 684 F.2d 1193 (6th Cir. 1982), *cert. denied*, 103 S.Ct. 1501 (1983). In *Steele*, a different Sixth Circuit panel concluded that because the *accused* was "at fault" for the absent declarant's unavailability, the admission of the co-conspirator statements did not infringe confrontation clause rights as embodied in the "necessity" prong of *Roberts*. However, *Steele* expressly observed that "it is questionable whether [declarant's] statement is admissible under the Confrontation Clause in the absence of a finding that the defendant's wrongfully caused the witness's unavailability." *Id.* at 1203. Significantly, the panel that decided this case did not so much as cite either *Roberts* or *Steele*, despite Petitioners' having urged the direct applicability of both cases.

[10] Petitioners here *do not* argue that evidence admissible under F.R.E. 801(d)(2)(E) necessarily runs afoul of the *Roberts* "reliability"

issue involved in this case was addressed by the Third Circuit in *United States* v. *Gibbs*, 703 F.2d 683 (3d Cir. 1983) just after the Sixth Circuit's decision here. As here, *Gibbs* involved a challenge to the admission of co-conspirator testimony based upon the "necessity" prong of *Roberts*. The Third Circuit squarely held that:

> where the Government has not demonstrated that the declarant is unavailable, and where the out-of-court statements are not sufficiently reliable and peripheral to justify dispensing with the unavailability requirement, the statements may not be admitted into evidence. 703 F.2d at 694.

Judge Rosenn and Chief Judge Seitz recognized in *Gibbs* that although there was "other evidence linking Gibbs to the conspiracy", the challenged statements provided "direct incriminating evidence". In any event the statements were more significant than the single sentence reported by one of twenty witnesses, the admission of which without any showing of the declarant's unavailability had been countenanced in *Dutton*. *Id.* More importantly, ruled the Third Circuit, the Government "has not 'met *its burden* to show that [the denial] . . . is such an exceptional situation" to warrant dispensing with confrontation. *Id.* (emphasis added).

Compelling reasons exist to review the Sixth Circuit's facile forgiveness of the Government's failure to show why the absent witnesses here were unavailable. First, despite *Roberts'* clear mandate, there is still a clear conflict between the courts, particularly between the Third and Sixth Circuits, as to the interrelationship of the Confrontation Clause and F.R.E. 801(d)(2)(E) and as to the need for an unavailability showing. The need for resolution of this conflict and for clear directions to trial courts was best expressed by the District Court's invitation here "to take this to the Supreme

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requirement. Petitioners do contend that merely because a statement falls within a well-rooted hearsay exception does not dispense with the prosecutor's duty to show why an absent declarant is unavailable, as per the "necessity" prong of *Roberts*.

Court and let them bite the bullet between the federal rules of evidence and the Confrontation Clause." App. 18a.

Second, despite *Roberts'* mandate that the prosecution produce or demonstrate the unavailability of the declarant, federal prosecutors are consciously continuing to adhere to the view that satisfaction of Rule 801(d)(2)(E) alone dispenses with any need to meet this requirement.[11] In conspiracy cases, this tactic affords the prosecutor the luxury of calling only a few trained witnesses, from whose mouths are elicited, as co-conspirator testimony against the accused, the testimony of a host of absent witnesses concerning significant links in the chain of the charged conspiracy. Certiorari should be granted to foreclose a continuing prosecutorial abuse of Sixth Amendment rights.

Third, a writ of certiorari should issue to resolve confusion over the scope of any exception to the general duty to show why an absent declarant is unavailable. Courts are relying on a misreading of the exception set forth in the *Roberts* footnote to swallow the *Roberts* rule. In emphasizing that the *Dutton* exception was carved out only because the plurality Court found "the utility of trial confrontation" to be "so remote",[12] this Court in *Roberts* obviously was emphasizing that *Dutton* involved a very unique factual matrix. Facts adduced *at trial* in *Dutton* showed that the extrajudicial statements were only "of peripheral significance", the declarant's knowledge of the identity and role of the conspirators was "abundantly established", it was "inconceivable" that declarant could be shown not to have known if defendant was involved, and it was "wholly unreal" that cross-examination would have had any utility.[13] However, the Sixth Circuit here viewed the *Dutton* exception far more broadly by holding that it is necessary to show why the declarant is unavailable only when the evidence

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[11] The prosecutors here and in *Gibbs* maintained that "a showing of unavailability is not required." *Gibbs*, 703 F.2d at 692; App. 16a-17a.

[12] *Roberts*, 448 U.S. at 65, n. 7.

[13] *Dutton*, 400 U.S. at 87-89. The Third Circuit in *Gibbs*, 703 F.2d at 693-694, properly recognized how narrow the *Dutton* exception is in *Roberts'* aftermath.

is crucial to the prosecution or devastating to the defendant. App. 8a. Thus having elevated the *Roberts* exception above the *Roberts* rule, the Sixth Circuit decided, *sub silentio*, that the Government can prove *four of its own ten* specifications of a charged conspiracy without demonstrating why the absent witnesses so testifying were unavailable for confrontation. The Sixth Circuit's obviously low thresholds of "cruciality" and high thresholds of "devastation" make a mockery of *Roberts*.

Fourth, certiorari should issue to clearly explicate that the Government bears the burden *at trial* either of:

1. producing the witness or demonstrating his unavailability, or

2. making a showing satisfactory to the trial judge that the utility of trial confrontation is so remote, and the subject of the extrajudicial statement so peripheral, that no showing of unavailability is required.

If an exception to the *Roberts* rule is warranted, its applicability first should be decided by the trial court on reasons then supplied by the prosecution. *Gibbs* correctly recognized that because confrontation "may only be denied in exceptional situations," it is the Government's "burden to show that the instant case is such an exceptional situation."[14] Here, the Sixth Circuit *itself* determined that the showing of unavailability was excusable. But the District Court did not consider that question, and the Government did not raise it until the appeal. Petitioners were foreclosed by the Sixth Circuit either from limiting the Government's Brief to the issue of whether an unavailability showing is ever required or from supplementing the record with grand jury transcripts which established a genuine factual issue as to the potential utility of trial confrontation.[15] Thus, certiorari should issue to establish the pro-

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[14] 703 F.2d at 694 ("The prosecution has failed to establish . . . that the hearsay is sufficiently reliable and insignificant to justify dispensing with a showing of unavailability.").

[15] It is error for a court of appeals to uphold the admission of evidence on a basis different from that argued to the trial court when the trial court's ruling foreclosed an opportunity to make the factual findings needed to pass on the contention raised as alternate grounds

cedural requisites, the burden of proof, and the scope of a court of appeals' review power, where an exception to the unavailability showing rule is invoked as an excuse for denying confrontation.

These questions permeate criminal conspiracy trials and involve paramount Constitutional rights. It is now time to halt the Constitutional abuse that is engendered by the circuits' uneven application and evasive treatment of *Ohio* v. *Roberts*, and by the Government's unstemmed refusal to follow the two-track Confrontation Clause analysis employed therein. Petitioners therefore have accepted the District Court's plea to take this issue to this Court.

II. THE SIXTH CIRCUIT'S ANALYSIS OF F.R.E. 404(b) CONFLICTS WITH THAT EMPLOYED IN OTHER CIRCUITS, IS UNPRECEDENTED IN SEVERAL RESPECTS, AND SANCTIONS THE USE OF PRIOR BAD ACTS TO SHOW PROPENSITY TO CONSPIRE

A. Introduction

For the first time, a Court of Appeals has sanctioned the wholesale introduction of devastating testimony as to prior crimes in a *per se* Sherman Act case merely because the defendants denied the existence of the agreement charged in the indictment and made a peripheral reference to the fact that they were merely present when alleged conspiratorial discussions took place. In doing so, the Court of Appeals took a path which even the District Court rejected as being much too prejudicial to Petitioners since the evidence effectively proved only their propensity to commit Sherman Act crimes.

The reasons why a writ should issue to review the Sixth Circuit's decision are amplified below.

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for admissibility on appeal. This is especially the case where constitutional error is involved. *Klein* v. *Harris*, 667 F.2d 274, 290-291 (2d Cir. 1981) *overruled on other grds. sub nom Daye* v. *Attorney General*, 696 F.2d 186 (2d Cir. 1982); *Amador Beltran* v. *United States*, 302 F.2d 48, 52 (1st Cir. 1962).

B. The Sixth Circuit's Analysis Conflicts With That In Other Circuits

"Intent" is the most frequently invoked exception to Rule 404(b)'s prohibition on the use of prior bad acts. Despite the number of cases, there is hopeless conflict among (and within) the circuits over the proper mode of analyzing whether the exception applies:

> Intent is generally an element of any crime with which the defendant has been charged. The courts differ on whether this entitles the prosecution to prove intent — and use other crime evidence to do so — regardless of the crime, the defense asserted, or the other evidence available.[16]

The principal area of conflict is whether intent must only be *an* issue, or whether the defense first must place intent *in* issue, and if the latter, under what circumstances will the defense be deemed to have done so.[17]

The better view is that, because intent is at least a nominal element of every crime, prior bad acts cannot be admitted under Rule 404(b) until the defense genuinely contests whether he possessed the requisite intent. The courts so holding make clear that this means more than pleading not guilty or contending that the accused did not do the "act" which is alleged to be criminal, if done with the requisite intent. Thus, several courts have observed that prior bad acts are inadmissible where the offense is one where the requisite

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[16] 2 Weinstein, *Evidence*, ¶ 404[09] at 404-52 (1982).

[17] "Recognizing that the routine use of this exception could easily destroy the exclusionary rule, some courts have imposed additional requirements for its use. The most common of those rules demands that intent be a material issue in the case. This means more than that intent must be an element of the crime charged . . . The issue of intent must be seriously disputed . . . [However, the cases] . . . do not spell out how the trial court is to determine when intent is being seriously disputed . . . [and the] rule requiring intent to be disputed is not always followed and some opinions have flatly rejected it." 22 Wright & Graham, *Federal Practice & Procedure*, § 5242 at 488-490 (1978).

criminal intent would normally be inferable from proof of the proscribed act, and where the defense does *not* defend on the basis that, though he committed the act, he lacked the requisite intent. Under this view, the accused takes intent out of the case either by stipulation or by an express disavowal of an intent-based defense.[18] This is clearly the position of the Second[19] and District of Columbia Circuits[20], and until this case it was the position of the Sixth.[21] Decisions from the Fifth,[22] Seventh,[23] and Ninth[24] Circuits have also embraced this rationale, although other decisions in those circuits take a contrary view.

The other view is simply that if intent is *an* element of the crime charged, the prosecutor can delve into prior acts in his case in chief, regardless of whether the accused genuinely disputes intent, on the theory that the not guilty plea or a defense which only denies commission of the "act" part of the crime is sufficient. This doctrine, which effectively makes the admission of prior bad acts automatic, is the view of the

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[18] *See, e.g., United States* v. *Figueroa*, 618 F.2d 934, 942 (2d Cir. 1980); *United States* v. *Ring*, 513 F.2d 1001, 1008-1009 (6th Cir. 1975).

[19] *United States* v. *Figueroa*, 618 F.2d 934, 938-939 (2d Cir. 1980); *United States* v. *Mohel*, 604 F.2d 748 (2d Cir. 1979); *United States* v. *Manafzadeh*, 592 F.2d 81, 86 (2d Cir. 1979); *United States* v. *O'Connor*, 580 F.2d 38, 40-43 (2d Cir. 1978); *United States* v. *Benedetto*, 571 F.2d 1246, 1248-1249 (2d Cir. 1978).

[20] *United States* v. *Foskey*, 636 F.2d 517, 523-524 & n. 7 (D.C. Cir. 1980); *United States* v. *James* 555 F.2d 992, 999-1000 & n. 46 (D.C. Cir. 1977).

[21] *United States* v. *Johnson*, 697 F.2d 735, 738-739 (6th Cir. 1983); *United States* v. *Phillips*, 599 F.2d 134, 136-137 (6th Cir. 1979); *United States* v. *Ring*, 513 F.2d 1001, 1008-1009 (6th Cir. 1975).

[22] *United States* v. *Silva*, 580 F.2d 144, 148 (5th Cir. 1978), *appeal after remand*, 611 F.2d 78 (1980); *United States* v. *San Martin*, 505 F.2d 918, 921-922 (5th Cir. 1974). *Cf. United States* v. *Webb*, 625 F.2d 709, 710 (5th Cir. 1980).

[23] *United States* v. *Miller*, 508 F.2d 444, 448-450 (7th Cir. 1974); *United States* v. *Fierson*, 419 F.2d 1020, 1022-1023 (7th Cir. 1969).

[24] *United States* v. *Powell*, 587 F.2d 443, 448 (9th Cir. 1978), *appeal after remand*, 632 F.2d 754 (1980).

Eighth Circuit,[25] and seems also to be the current view of the Fifth,[26] Seventh,[27] and Eleventh[28] Circuits.

That this conflict has extensive practical consequences is best exemplified by this case. The Sixth Circuit did not quarrel with the fact that Petitioners *never* defended on the basis that they had agreed to rig the bids but did so innocently. Nor did the Sixth Circuit quarrel with the fact that Petitioners' counsel repeatedly and expressly disavowed an intent-based defense. In conspiracy cases, the 'act' part of the crime is the agreement[29] and the Sixth Circuit recognized that the defense was a "lack of agreement defense." Under the rule that a denial of the 'act' part of the crime raises no issue of intent, the prior act evidence would have been inadmissible. However, the Sixth Circuit's holding, premised as it was on the conclusion that denying the agreement placed intent in issue, resulted in the admission of the evidence simply because the defense put on a defense at all. This was especially egregious because, as shown below at C(2), proof of the 'act' part of the antitrust crime – the agreement – would of necessity prove that the parties had the basic intent to agree. Alternatively, the Sixth Circuit found that because Petitioners raised a 'mere presence' defense, the prior act evidence was admissible. While Petitioners disagree that this was a ma-

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[25] *United States* v. *Burchinal*, 657 F.2d 985, 993 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981); *United States* v. *Sherer*, 653 F.2d 334, 338-339 (8th Cir.), *cert. denied*, 454 U.S. 1034 (1981); *United States* v. *Engleman*, 648 F.2d 473, 478-479 (8th Cir. 1981); *United States* v. *Ulland*, 643 F.2d 537, 541 (8th Cir. 1981).

[26] *United States* v. *Buchanan*, 633 F.2d 423, 426 (5th Cir. 1980), *cert. denied*, 451 U.S. 912 (1981).

[27] *United States* v. *Price*, 617 F.2d 455, 459-460 (7th Cir. 1980); *United States* v. *Weidman*, 572 F.2d 1199, 1201-1202 (7th Cir.), *cert. denied*, 439 U.S. 821 (1978).

[28] *United States* v. *Bulman*, 667 F.2d 1374, 1382 (11th Cir. 1982), *cert. denied*, 456 U.S. 1010 (1982).

[29] *See* LaFave & Scott, *Criminal Law* § 61 at 460 (4th Repr. 1978) ("Conspiracy is not an exception" to the "general rule" that "an essential element of every crime is an act" because "the agreement itself is the requisite act").

terial part of the defense, the fact is that a claim that one was merely present or silently present is wholly consistent with a denial of the act of agreement; it merely negatives that the accused made any manifestation of having agreed, and such a claim is at best neutral as to whether the accused possessed the unmanifested requisite intent.[30] Thus, by allowing the prior act evidence to show intent because the accused claimed 'mere presence' – over an express disavowal that such claim was meant to raise an issue about intent – the Sixth Circuit held that a mere denial of the act is enough. This result could not have obtained under the cases previously cited.[31]

Because of this conflict, and because Rule 404(b) itself provides no guidance as to its resolution, this Court now should decide that prior bad acts are inadmissible to show intent where the accused simply denies the act part of the crime and disavows an intent-based defense, especially where the requisite intent follows as a necessary inference from proof of the proscribed act.

C. The Sixth Circuit's Novel and Unwarranted Extensions of F.R.E. 404(b) Raise Important Questions Of Federal Law Concerning The Proper Interpretation Of That Rule

1) There Is No Precedent For Admitting Prior Bad Acts In A Per Se Criminal Sherman Act Case, And The Sixth Circuit's Ruling Makes Such Evidence Automatically Admissible

In no prior case has any court permitted prior bad acts to be used to show intent in a *per se* criminal antitrust case. Neither the Government nor the courts below ever cited any

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[30] It is hornbook law, and the jury here was instructed, that the mere presence of the accused with other alleged conspirators is not evidence of the conspiratorial agreement. Therefore, to the extent 'mere presence' was claimed, such did not rise to the level of a concession of the act of conspiracy, and a denial of the requisite intent.

[31] *See supra* notes 19 & 21 and especially, *United States* v. *Figueroa*, 618 F.2d at 941; *United States* v. *Ring*, 513 F.2d at 1007-1009.

such precedent. The few cases to consider the issue have disapproved of reference to uncharged offenses in this type of case, either because of its potential for prejudice[32] or because intent to effectuate the object of the conspiracy is not an issue in such cases.[33] In Sherman Act § 1 cases, "the criminal act is the agreement."[34] "No agreement" is the only defense to such a charge; it is made by the not guilty plea. The Sixth Circuit's ruling makes the admission of such evidence automatic in criminal Sherman Act cases, is unprecedented, and conflicts with the cases to address the issue. Any such sweeping extension of the law deserves review by this Court.

2. In Violation of Rule 404(b)'s Express Prohibition, The Sixth Circuit Sanctioned The Use of Prior Bad Acts To Prove That The Accused Acted In Conformity Therewith

This case presents the important federal question whether F.R.E. 404(b)'s express prohibition against use of prior bad acts to show that the accused acted in conformity can be avoided in a *per se* Sherman Act criminal case simply by admitting such evidence under the guise of "intent to agree", described by this Court in its *Gypsum* opinion as that "which is necessary to establish the existence of the conspiracy."[35] Because the Sixth Circuit failed to realize that "basic intent to agree" is inseparable from the proscribed act of conspiracy, it effectively permitted the government to prove that Petitioners rigged Contracts 8148 and 8175 because they had

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[32] *United States* v. *Kahan & Lessin Co.*, 695 F.2d 1122, 1124 (9th Cir. 1982); *United States* v. *Brighton Bldg. & Maint. Co.*, 598 F.2d 1101, 1108-1109 (7th Cir.), *cert. denied*, 444 U.S. 840 (1979).

[33] *United States* v. *Bensinger Co.*, 430 F.2d 584, 594 & n. 4 (8th Cir. 1970). *See* notes 38 - 40, *infra*.

[34] *United States* v. *Gillen*, 599 F.2d 541, 545 (3rd Cir.), *cert. denied*, 444 U.S. 866 (1979). *Accord*, *Nash* v. *United States*, 229 U.S. 373, 378 (1913).

[35] *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 443, n. 20 (1978).

allegedly rigged other contracts. This sort of reasoning has infected other conspiracy cases involving bad act evidence issues:

> But other crimes, wrongs, or acts extraneous to the conspiracy are sometimes admitted as relevant to the existence of a conspiracy with virtually no analysis by the court of why the defendant's participation in conspiracies amounts to anything more than proof of his propensity to engage in crime.[36]

It is now time to inter this misapplication of Rule 404(b).

The *per se* Sherman Act offense is *sui generis* because, unlike all other conspiracy offenses, there need be no proof of intent to achieve objective, a.k.a. specific or elevated intent.[37] Even after this Court's *Gypsum* decision, the courts have uniformly held that in *per se* criminal antitrust offenses, *"no inquiry has to be made on the issue of intent beyond proof that one joined or formed the conspiracy"*[38]; no issue exists of intent to effectuate the object of the conspiracy[39]; and proof of the act of agreement makes it "impossible to infer lack of the requisite intent."[40] Similarly, the Government's steadfast position is that "specific intent need not be proved in Sherman Act cases", and that proof of an agreement of the

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[36] 2 *Weinstein, supra*, note 16, ¶ 404[09] at 404-54.

[37] La Fave & Scott, *Criminal Law* § 61 at 464 (1972).

[38] *United States* v. *Gillen*, 599 F.2d 541, 545 (3rd Cir.), *cert. denied*, 444 U.S. 866 (1979) (emphasis added).

[39] *United States* v. *Cargo Service Stations, Inc.*, 657 F.2d 676, 682-683 (5th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); *United States* v. *Koppers Co.*, 652 F.2d 290, 293-296 (2d Cir.), *cert. denied*, 454 U.S. 1083 (1981); *United States* v. *SIGMA*, 624 F.2d 461, 465 (4th Cir. 1979), *cert. denied*, 449 U.S. 1078 (1981); *United States* v. *Continental Group, Inc.*, 603 F.2d 444, 461-462 (3rd Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980); *United States* v. *Brighton Bldg. & Maint. Co.*, 598 F.2d 1101, 1106 (7th Cir.), *cert. denied*, 444 U.S. 840 (1979).

[40] *United States* v. *Azzarelli Const. Co.*, 612 F.2d 292, 297-298 (7th Cir. 1979), *cert. denied*, 447 U.S. 920 (1980).

per se illegal class carries "its necessary inference of criminal intent."[41]

Thus, the basic intent to agree is all that need be proved in *per se* cases. Because this type of intent goes to establish "the existence of the conspiracy",[42] it is simply part of the prosecutor's burden to prove the 'act' part of the crime — the agreement itself.[43] As both the trial judge here (App. 21a-22a, 28a-29a) and leading commentators have observed,

> Every conspiracy involves an agreement, so it must be established that the several parties intended to agree. But such an intent is 'without moral content' . . . *The intent to agree is so intimately tied up with the agreement (the act part of the crime) that it is best dealt with in that context. Indeed, it may even be said that such intent is not really part of the mens rea of the conspiracy.*[44]

Because intent to agree is best dealt with in the context of the act part of the crime, and because it is not really part of the *mens rea* of the conspiracy, to use prior bad acts to show 'intent to agree' is simply a euphemism for proving one crime by proving other crimes. Not only does this violate the express prohibition of Rule 404(b), it also has the vicious consequence of allowing the prosecutor to bootstrap a weak case on the fact of anticompetitive agreement with resort to extraneous misdeeds neither directly nor circumstantially re-

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[41] 13c B.N.A. Law Reprints, "Trade Regulation Cases Denied Certiorari 1979-1980", Brief for the United States in Opposition to Petition in No. 78-1872, pp. 63-64; Ass't. Atty. Gen Favretto, "Criminal Antitrust Prosecutions-The *Gypsum* Opinion", 5 CCH Trade Reg. Rptr. ¶ 50,412 at 55,919 (March 26, 1980).

[42] *See supra* note 35.

[43] In this connection, the bad act witnesses' testimony here established only that Petitioners had agreed to rig other bids; it did not, save by necessary inference, establish that they intended to agree. From the fact of prior agreements, the jury had to infer both intent to agree on the prior occasions and intent to agree as to the charged offense.

[44] LaFave & Scott, *supra* note 37. (emphasis added). This Court relied heavily on LaFave & Scott in its *Gypsum* decision. 438 U.S. at 441 n. 17, 443 n. 20, 445.

lated to the charged offense. This Court now should clarify its *Gypsum* opinion and restore logic to the courts' application of Rule 404(b) in conspiracy cases by announcing the rule adopted here by the trial court: basic intent to agree must be proved by direct and circumstantial evidence of the charged conspiracy, and not by prior, unrelated conspiracies.

3. Contrary To Settled Rules, The Sixth Circuit Failed To Defer To The Trial Court's Discretion In Concluding That The Evidence Was Admissible On A Ground Expressly Rejected By The District Court

One of the few matters involving Rule 404(b) about which the courts are in unanimous agreement is that the appellate court is to give great deference to the wide measure of discretion accorded to the trial courts in ruling on the admissibility of other crimes.[45] Here, the Sixth Circuit stood this rule on its head by concluding that the evidence was admissible on the ground *expressly rejected* by the trial court, with no suggestion that the trial court had abused its discretion in making the ruling.[46] This arbitrary substitution

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[45] *See, e.g., United States* v. *Johnson*, 697 F.2d 735, 739 (6th Cir. 1983); *United States* v. *Baskes*, 649 F.2d 471, 481 (7th Cir. 1980), *cert. denied*, 450 U.S. 1000 (1981); *United States* v. *Bohr*, 581 F.2d 1294, 1299 (8th Cir.), *cert denied*, 439 U.S. 958 (1978). While there is a conflict over whether an appellate court may affirm the admission of bad act evidence on a ground not presented to the district court, compare *United States* v. *Baldarrama*, 566 F.2d 560, 567 (5th Cir.), *cert. denied*, 439 U.S. 844 (1978) and *United States* v. *Gocke*, 507 F.2d 820, 824 n. 4 (8th Cir. 1974), *cert. denied*, 420 U.S. 979 (1975) to *United States* v. *Pantone*, 609 F.2d 675, 682 (3rd Cir. 1979), it is a novel extension of this to affirm the admission of bad act evidence on a ground expressly rejected by the trial court. The sole decision which appears to have done so, *United States* v. *Weidman*, 572 F.2d 1199, 1201-1203 (7th Cir. 1978), has been correctly criticized as "a particularly egregious example of appellate cynicism." 22 Wright & Graham, *supra* note 17, § 5249 at 260-261 (Supp. 1982).

[46] Indeed, the Sixth Circuit resorted to the argument that the District Court had earlier found the evidence admissible, without recognizing either that the District Court recanted this finding

of an appellate court's whim for the district court's discretion so far departs from the accepted rule forbidding such rebalancing as to call for this Court's review.

D. This Court's Failure to Address Rule 404(b) Has Spawned Confusion and Conflict, And It Is Now Time to Delimit the Contours of the Rule

So widespread is the abuse of Federal Rule of Evidence 404(b) that the number of criminal defendants being effectively tried as recidivists is unknowable: "There is no question of evidence more frequently litigated in the appellate courts than the admission of evidence of other crimes, wrongs, or acts."[47] As leading commentators recognize (and as shown above), "despite the recurrence of the issue, the opinions are often poorly reasoned and provide little guidance to trial judges"[48] the decisions "often cannot be reconciled"[49]; the drafters of the rule "chose to leave the law in its messy state"[50]; and the rule itself "does nothing to clarify the issues, and may in some respects have muddied the waters even more."[51] While this Court has long recognized the severe prejudice which obtains when the accused's past alleged misdeeds are improperly aired at trial, *Michelson* v. *United States*, 335 U.S. 469, 475-476 (1948), it has never addressed the contours of Rule 404(b). The self-apparent importance[52] of the issue demands that this Court now do so.

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or that it finally admitted the evidence on a ground which the Sixth Circuit never addressed.

[47] 22 Wright & Graham, *supra* note 17, § 5239 at 427-428 (1978). *Accord*, 2 Weinstein *Evidence* ¶ 404[08] at 404-47 (1982) (rule has spawned "more decisions than occasioned by any other single rule").

[48] 22 *Wright & Graham*, *supra* note 47, at 427-428.

[49] 2 Weinstein, *supra* note 47, at 404-45.

[50] 22 *Wright & Graham*, *supra* note 47, at 427-428.

[51] *Id.*

[52] "An obvious truth is that once prior convictions are introduced the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality." *United States* v. *Burkhart*, 458 F. 2d 201, 204 (10th Cir. 1972).

This case presents the appropriate framework in which to address the scope of Rule 404(b), involving as it does all of the following: an extension of the rule to new types of cases; violation of the rule's express prohibition against using past misdeeds to show propensity to act illegally; the most frequently invoked exception to the general rule barring prior acts; and the novel case where the appellate court rests its decision on a ground expressly rejected by the trial court. Moreover, this is an antitrust prosecution and the Justice Department's criminal enforcement efforts have been and continue to be directed almost exclusively at alleged bid-rigging among construction contractors[53]; therefore, the issue is bound to recur in cases yet to reach this Court. Evidentiary standards in federal criminal trials ought not depend upon the defendant's fortuity to be tried in one circuit or another.

III. THE CONFLICT BETWEEN THE JURY INSTRUCTIONS HERE AND THOSE MANDATED BY THIS COURT'S GYPSUM OPINION REQUIRES REVIEW, WHERE THE DISTRICT COURT ERRONEOUSLY APPLIED GYPSUM TO A PER SE OFFENSE FOR PURPOSES OF ADMITTING BAD ACT EVIDENCE AND THEN FAILED CORRECTLY TO INSTRUCT THE JURY AS TO THE MENS REA STANDARDS PRESCRIBED IN THAT CASE

While the Sixth Circuit deemed it "unnecessary" to express a view on the applicability of *Gypsum's* intent standards to *per se* antitrust offenses, Petitioners submit that this case affords compelling reasons for this Court to do so because of the unique circumstances in which the issue arose.

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[53] Assistant Atty. General Baxter, Statement Before the House Subcommittee on Monopolies and Commercial Law (Department of Justice Press Release, March 10, 1983) ("Our . . . prosecutions of criminal collusion among highway and airport contractors are still continuing, and appear likely to continue for some time to come. To date, this category of cases alone has resulted in the criminal prosecution of 209 individuals and 189 corporations in 15 states. We currently have under way investigations in several other states as well . . . .").

This Court has let stand the conclusion of every circuit court to address the issue that *Gypsum's* elevated intent standards are inapplicable to the *per se* criminal antitrust case and that therefore, the trial court is justified in failing to instruct the jury about *Gypsum* style intent.[54] What differentiates this case from those cases is that (1) the trial court here reached the *contrary* conclusion, but then used that conclusion to stab Petitioners with evidence of their prior bad acts; and (2) the trial court attempted to give the intent instructions mandated by *Gypsum*, but did so incompletely. Therefore, this Court should now decide whether *Gypsum's* intent standards[55] are applicable in *per se* offenses, lest courts seize on *Gypsum* style intent to create a false basis for admitting prior misconduct in *per se* cases[56], and lest courts properly invoking *Gypsum* fail to give the instructions required thereby to avoid the kind of error proscribed by *Sandstrom* v. *Montana*, 442 U.S. 510 (1979) and more recently condemned in *Connecticut* v. *Johnson*, 103 S.Ct. 969, 978 (1983).[57]

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[54] *See supra* notes 38-40.

[55] In *Gypsum*, this Court held that in at least some types of criminal antitrust offenses, the Government must prove in one of two ways that the accused intended to effectuate the object of the conspiracy: by proof of "action undertaken with knowledge of its probable anticompetitive consequences and having the requisite anticompetitive effects", or by proof that the accused acted "with the 'conscious object' of producing such effects", regardless of whether those effects came to pass. 438 U.S. at 444 & n. 21.

[56] If intent is neither "in issue", nor "an issue", Rule 404(b) affords no basis for the admission of other crimes, wrongs, or acts. Thus, if *Gypsum*-style intent is not a proper issue in a *per se* case, the trial court here plainly erred. Even if *Gypsum*-style intent is now held to be a requisite element of the *per se* criminal offense, it is error to admit similar acts to prove that element because direct and circumstantial proof of the charged agreement to rig bids, if believed, "makes it impossible to infer lack of the requisite intent." *United States* v. *Azzarelli Const. Co.*, 612 F.2d at 297-298.

[57] In failing to instruct the jury that it must first find that anticompetitive effects took place before it could convict on the standard of

IV. THE SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL REQUIRES THAT A COURT OF APPEALS STAY PROCEEDINGS BEFORE IT UNTIL THE APPELLANT IS MENTALLY ABLE TO CONSULT WITH HIS COUNSEL

Since November 11, 1982, Petitioner Vann has been without any cognitive abilities, including the ability to respond to or communicate with counsel in any manner. He has had no opportunity to review the Government's brief on appeal, nor to participate in the preparation of his reply brief, motion to supplement or strike, petition for rehearing, this petition for certiorari, or in the oral argument before the Sixth Circuit. Vann's counsel promptly alerted the Sixth Circuit to this condition and requested a continuance of the oral argument, including the suggestion that his constitutional rights would be jeopardized if the case were not continued. This application was denied.

A writ of certiorari should issue to resolve the important question as to whether the Sixth Amendment permits judicial interference with the guaranteed right of an accused to consult with counsel during the pendency of his direct appeal from a felony conviction, by proceeding despite notification that the accused has been totally incapacitated.[58] This precise question has never been addressed in any reported opinion, but this Court's prior decisions compel the conclu-

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knowledge of probable anticompetitive consequences, the trial court here invaded the factfinders' province to find anticompetitive effects and invited conviction on an intent standard less rigorous than this Court established in *Gypsum*. An incorrect instruction on an essential element is rarely if ever harmless error. *Connecticut* v. *Johnson*, 103 S.Ct. at 978; *Bollenbach* v. *United States*, 326 U.S. 607, 614-615 (1946).

[58] Petitioner Vann does *not* argue that the Sixth Amendment guaranteed him either the right to an oral argument or to be present thereat. *Herring* v. *New York*, 422 U.S. 853, 863 n. 13 (1975); *Faretta* v. *California*, 422 U.S. 806, 842 (1975) (Burger, C.J., dissenting). His contention is limited to the Sixth Circuit's effective denial of his right to consult with counsel at all as to the appellate proceedings after November 11, 1982.

sion that Petitioner Vann's Sixth Amendment rights were violated.

A criminal defendant clearly has the right to the assistance of counsel at all critical stages of a criminal proceeding.[59] Prejudice is presumed and no express showing of prejudice is required.[60] Since at least 1963, this Court has held that the right to counsel extends to an appeal from a felony conviction.[61] This includes "argument and submission of the case and does not terminate with the filing of the notice of appeal and the making of the record available to the appellate court."[62]

The right to assistance of counsel has always included the right to consult with counsel. As stated in *Chandler* v. *Fretag*, 348 U.S. 3, 10 (1954):[63]

> A necessary corollary [to the right of effective assistance of counsel] is that a defendant must be given a reasonable opportunity to . . . consult with counsel; otherwise the right to be heard by counsel would be of little worth.

Because a lawyer "assistant, however expert, is still an assistant", the counsel provision recognizes the fact that "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."[64]

This Court has zealously guarded the right of an accused to consult with counsel and virtually no interference with that right has been brooked.[65] For example, in *Geders* v.

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[59] *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932) (the accused "requires the guiding hand of counsel at every step of the proceedings against him"); *see also, Brewer* v. *Williams*, 430 U.S. 387, 398 (1977); *Gideon* v. *Wainwright*, 372 U.S. 335, 339-340 (1963); *Johnson* v. *Zerbst*, 304 U.S. 458, 462 (1938).

[60] *Glasser* v. *United States*, 315 U.S. 60, 76 (1942).

[61] *Douglas* v. *California*, 372 U.S. 353, 358 (1963).

[62] *Hoggatt* v. *Page*, 432 F.2d 41, 42 (10th Cir. 1970).

[63] *Accord*, *Powell*, 287 U.S. at 50; *Avery* v. *Alabama*, 308 U.S. 444, 446 (1940).

[64] *Faretta* v. *California*, 422 U.S. 806, 819-820 (1975).

[65] *See, e.g., Herring* v. *New York*, 422 U.S. 853 (1975); *White* v. *Ragen*, 324 U.S. 760 (1945); *House* v. *Mayo*, 324 U.S. 42 (1945).

United States, 425 U.S. 80, 91 (1976), this Court held that an order preventing petitioner from consulting counsel during an overnight recess between his direct and cross examination "impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment."[66]

Obviously, "an accused who is mentally incapable of consulting with counsel is denied both his right of effective assistance and his right of meaningful consultation." [67] This Court has stated in *Dusky* v. *United States*, 362 U.S. 402 (1960):

> [The test must be whether he has] sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding [and whether he has] a rational as well as factual understanding of the proceedings against him.

Clearly, Petitioner Vann was unable to consult with counsel under this test.

The sole excuse offered by the Sixth Circuit for refusing the stay was that counsel on appeal was also trial counsel. But nothing in this Court's prior decisions intimates that the right to consult with counsel terminates in the District Court. Because no difference in the trial and appellate stages of a case has been deemed sufficient to dispense with the accused's right to counsel in his appeal as of right, no reason exists to leave that right's necessary corollary languishing below. This is especially true where, as here, the government was permitted to raise new issues on appeal, thus making

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[66] In *Geders'* wake, numerous courts of appeal have ruled that orders barring attorney-client consultations during far shorter recesses violated the Sixth Amendment, explaining that the fundamentality of that right is such "that there should never occur any interference with it for any length of time, however brief, absent some compelling reason." *United States* v. *Allen*, 542 F.2d 630, 632-633 (4th Cir. 1976), *cert. denied*, 430 U.S. 908 (1977); *United States* v. *Conway*, 632 F.2d 641, 644-645 (5th Cir. 1980); *United States* v. *Bryant*, 545 F.2d 1035, 1036 (6th Cir. 1976). *Cf.*, *United States* v. *Vesaas*, 586 F.2d 101, 102 n. 2 (8th Cir. 1978).

[67] *Goodwin* v. *Swenson*, 287 F.Supp. 166, 178 (W.D. Mo. 1968),

consultation with the client all the more necessary. This Court's intervention is required lest the Sixth Circuit's evisceration of *Douglas* v. *California* be permitted to drive a wedge between the right to counsel on appeal and the right to consult counsel.

CONCLUSION

For all the reasons herein stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Murray S. Monroe
Counsel of Record for
Petitioner Vann
1800 First National Bank Center
425 Walnut Street
Cincinnati, Ohio 45202
(513) 381-2838

.....

Robert W. Ritchie
Counsel of Record for
Petitioner Melhorn
1130 Park National Bank Building
Knoxville, Tennessee 37902
(615) 637-0661

OF COUNSEL:

William J. Seitz
Taft, Stettinius & Hollister
1800 First National Bank Center
425 Walnut Street
Cincinnati, Ohio 45202
(513) 381-2838

John E. Eldridge
Ritchie, Chadwell & Eldridge
1130 Park National Bank Building
Knoxville, Tennessee 37902
(615) 637-0661

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 82-5384, 82-5385

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES E. MELHORN, (82-5384)
THOMAS P. VANN, (82-5385
Defendants-Appellants.

ORDER

(Filed March 8, 1983)

Before: KENNEDY and MARTIN, Circuit Judges; and HARVEY,* District Judge.

Defendants appeal their jury convictions for violations of the Sherman Act, 15 U.S.C. § 1, *et seq.*, contesting the admissibility of extrinsic act evidence, and asserting that the government violated their sixth amendment right of confrontation by admitting statements of co-conspirators into evidence pursuant to Fed. R. Evid. 801(d)(2)(E) without first establishing the unavailability of the declarant. For the reasons set forth below, we affirm the convictions.

Thomas P. Vann and James E. Melhorn are the President and Vice-President, respectively, of the Knoxville division of Ashland-Warren, Inc. (Ashland), a highway paving contractor.

* The Honorable James Harvey, United States District Court, Eastern District of Michigan, sitting by designation.

Ashland, Vann, and Melhorn were indicted on one count of rigging bids on interstate highway projects in Tennessee in violation of the Sherman Act, and on five counts of related mail fraud. The charges against Ashland, as well as the mail fraud counts, were severed and the individual defendants went to trial on the Sherman Act count. Both Vann and Melhorn were convicted by a jury of violating the Sherman Act, and the district court entered judgment, imposing suspended sentences of two years on Vann and one year on Melhorn, and ordering them to pay fines of $10,000 and $5,000, respectively.

This prosecution arose out of an agreement by highway construction companies to allocate among themselves federally assisted road projects on Interstate Highway 81 in northeastern Tennessee. Highway contracts are awarded through a competitive bid process.[1] Vann and Melhorn, as executives for Ashland, conspired with Carl Riddle and Stan Fugate, as executives for Interstate Paving Company, to allocate between themselves two paving contracts. They planned to arrange it so that Ashland would be low bidder on Contract No. 8148, while Interstate would be low bidder on Contract No. 8175.

Fugate contacted Vann and Melhorn sometime in early May, 1979, shortly after the State advertised 8148 for letting. The three men discussed rigging the bids. When the list of prospective bidders was published, Fugate again contacted Vann and Melhorn to divide-up the list of prospective bidders so that they would contact each potential competitor in an effort to influence his bid. Fugate contacted Ronnie and

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[1] After the Federal Highway Administration approves a highway project, Tennessee conducts a bid 'letting'. The Tennessee Department of Transportation advertises the projects to be let and contractors then request bidding proposals. Several days prior to the letting, a list is compiled of the names of all the companies that have obtained proposals. Based on that list, all the contractors who had requested proposals must decide whether to bid and, if they so choose, must submit a sealed bid on the day of the letting. Each bidder executes an affidavit attesting to the fact that he has not 'rigged' the bidding. The project is awarded to the lowest bidder.

Buddy Pope of Pope Paving and requested that they not bid competitively on 8148. Fugate contacted Summers-Taylor, Inc. with the same message. Neither company bid on 8148. Fugate and Riddle were to contact certain other contractors, while Vann and Melhorn were to contact, among others, D. R. Allen & Son, Inc.

On the evening prior to the letting of 8148, May 17, 1979, appellants met with Fugate and Riddle. At this meeting, Vann indicated that he had been unable to contact D.R. Allen but would continue to try. Later that night appellants, Fugate, Riddle, and Hoyl Gill, an executive of American Limestone, a stone supplier, drove to Vulcan Materials, another stone supplier, to speak with Carl Register. Hoyl Gill stayed in the car while the others told Register that American Limestone was going to supply Ashland with the stone needed for the 8148 project. Register wanted to sell the stone for that project and, therefore, argued that it should be bid competitively. Register was told that he might be selected to supply the stone needed for 8175 when it obtained that project, but the issue was not resolved that evening.

Late that same night, Melhorn contacted Fugate and asked Interstate to submit a complementary bid on 8148 in an amount above $2.5 million. Interstate did so. The result of the bidding was as follows:[2]

D. R. Allen & Son, Inc.	$2,110,435.60
Hoover, Inc.	2,121,743.96
Ashland-Warren, Inc.	2,349,782.97
Interstate Paving Co.	2,504,328.08

D. R. Allen, the low bidder and recipient of the contract, and Hoover, Inc. had not been contacted by the conspirators. Vann had been unable to contact Allen and mistakenly decided that D. R. Allen was not a threat.

After D. R. Allen had been awarded the contract, Riddle and Fugate suggested to Vann that Ashland subcontract the project. Initially D. R. Allen refused Ashland's overtures but

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[2] Appellants argue that all of the bids were below the state's estimate, indicating an absence of rigging.

it eventually subcontracted 8148 to Ashland for $250,000 — Ashland and Interstate each paid $125,000.

The State advertised Contract 8175 for letting on June 29, 1979. Fugate contacted Summers-Taylor and Pope, requesting that they not bid competitively on 8175. Each agreed. Fugate also contracted Malone Brothers and Benward, Inc., to inquire whether either was interested in bidding competitively on 8175. Neither company expressed an intent to do so. Riddle contacted several contractors regarding 8175, including Tillett Brothers. Interstate paid Tilletts $25,000 to submit a complementary bid of $2.7 million.

Vann and Fugate approached Nate Pendleton of Pendleton Construction and inquired as to whether Pendleton was interested in 8175. Pendleton originally claimed that he needed the work, but he eventually agreed to submit a complementary bid of $2.7 million in exchange for Fugate's offer to purchase a storage bin which Pendleton had been trying to sell.

On the night before the bidding, Fugate called Vann and gave him a complementary amount to bid on 8175. The result of the bidding on 8175 was as follows:

Interstate Paving Co.	$2,551,115.55
Ashland-Warren, Inc.	2,559,305.00
Tillett Bros. Const. Inc.	2,657,925.75
Pendleton Const. Corp.	2,726,068.00

Interstate was low bidder, but the State rejected all of the bids because they were too far over the estimated cost of the project. The State re-advertised 8175 for bidding on September 21, 1979. Prior to reletting, Fugate contacted Pope, Malone, and Pendleton, all of whom agreed either not to bid or to submit a complementary bid. Richardson, of Interstate, contacted Tillett to confirm that it would not bid. Fugate contacted Vann and instructed him to submit a complementary bid in approximately the same amount that had been bid the first time. Interstate was again low bidder and was awarded the project.

Extrinsic Act Evidence

At trial the prosecution submitted evidence of other bid-rigging operations in which Melhorn and Vann had participated to establish the element of intent to commit the offense charged. *United States* v. *Ring*, 513 F.2d 1001 (6th Cir. 1975) sets forth the guidelines to be followed in admitting extrinsic evidence to show intent or knowledge.[3] The similar act must bear a substantial similarity to the offense charged; must have occurred reasonably near in time to the offense charged; must be offered for a purpose 'in issue' and, therefore, be necessary; and must be more probative than prejudicial. The other incidents of bid-rigging were substantially similar to the offense charged and occurred within approximately one year – before or after – this incident. Accordingly, the first two requirements of *Ring* are satisfied.

Appellants assert that the third requirement of *Ring* was not met here because it was unnecessary to admit evidence of intent when intent was not 'in issue'. In *Ring*, this Circuit held that before prejudicial evidence of similar acts is admissible, the purpose for which the evidence is to be admitted must have been raised in substance, if not in words. Entry of a not guilty plea does not necessarily put every material fact 'in issue'. This Court identified a class of cases where criminal intent is normally inferable from the commission of the criminal act, for example, criminal mail fraud. Proof of the act of mailing gives rise to an inference of intent to mail. In those cases intent to mail is not a genuinely contested issue unless

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[3] Fed. R. Evid. 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, *intent*, preparation, plan, knowledge, identity, or absence of mistake or accident. (emphasis added)

The rationale for this rule is that "the recurrence of similar acts incrementally reduces the possibility that the given instance of illegal [conduct] is the result of inadvertance, mistake, or other innocent event." *U.S.* v. *Semak*, 536 F.2d 1142, 1145 (6th Cir. 1976).

the defendant pleads, for instance, that the mailing was done innocently or inadvertently. "But intent is not in issue when evidence of intent is inferable if the proscribed act is proven and defendant does not claim mistake or inadvertence." *Id.*, at 1009.

Relying upon language in *United States* v. *United States Gypsum Co.*, 438 U.S. 422 (1978) that intent may be inferred in a criminal antitrust prosecution from an act which has an anti-competitive effect on prices, *id.* at 466, appellants contend the evidence of other bid-rigging conspiracies should have been excluded as unnecessary. Some confusion arises from the fact that, as the *Gypsum* Court explained,

> In a conspiracy, two different types of intent are generally required – *the basic intent to agree, which is necessary to establish the existence of the conspiracy*, and the more traditional intent to effectuate the object of the conspiracy. – See W. LaFave & A. Scott, Criminal Law, 464-465 (1972).

438 U.S. at 443, n.20 (emphasis added). The parties to this action are in agreement that extrinsic act evidence was not admissible to show intent to effectuate the object of the conspiracy, which was the type of intent focused upon by the *Gypsum* Court, *id.* We, therefore, find it unnecessary to address that question. This dispute surrounds the admissibility of extrinsic act evidence to prove the basic 'intent to agree' element of a criminal anti-trust offense.

During their trials, appellants argued that while they had attended some meetings at which the rigging of contracts 8148 and 8175 was discussed, they were 'merely present' and never agreed to participate in the conspiracy. By asserting this 'mere presence' or 'lack of agreement' defense, appellants put intent to agree in issue. Accordingly, the evidence was 'necessary' within the meaning of *Ring*.

Appellants argue in the alternative that assuming the first three requirements of *Ring* have been satisfied, the evidence still should have been excluded as more prejudicial than probative. Evidentiary rulings rest in the sound discretion of the

trial court and will not be disturbed on appeal absent a showing of abuse of discretion. We find no such abuse.

Statements of Co-Conspirators

Fugate was allowed to testify about encounters he had with co-conspirators Malone, Renfro, and Pendleton. Fugate's testimony regarding Malone and Renfro merely consisted of an account of his contacts with those men in the furtherance of his conspiracy with appellants, and the fact that Malone and Renfro each stated that his company was not interested in bidding on Contract 8175. The importance of that testimony lay in Fugate's account of his own activities. That testimony was not hearsay and was clearly admissible. Whether or not Malone and Renfro actually had a lack of desire to bid on 8175 is unimportant and those statements were not admitted for the truth of the matter asserted. This was not hearsay evidence and was properly admitted.

Fugate's account of his contacts with Pendleton was more extensive. He explained various meetings and telephone conversations during which they discussed Pendleton's interest in Contract 8175, his desire to sell a hot storage bin, and his agreement to submit a complementary bid on 8175 in exchange for Interstate's purchase of the bin. Prior to admitting Fugate's testimony regarding Pendleton, there was an *in camera* meeting at which the trial judge concluded the evidence was clearly admissible under the co-conspirator exception to the hearsay rule.[4] We agree.

Appellants contend that even if the evidence was admissible under Fed. R. Evid. 801(d)(2)(E), they were denied their sixth amendment right of confrontation when the testimony was received without the prosecution having first established

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[4] Fed. R. Evid. 801(d)(2)(E) provides:

> A statement is not hearsay if—
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> • • • •
>
> (2) *Admission by party-opponent.* The statement is offered against a party and is • • • (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

the unavailability of the declarant, Pendleton. We need not intimate a view on whether the admission of evidence under an Fed R. Evid. 801(d)(2)(E) raises confrontation clause problems. Whether applying the rule that evidence admitted under the federal co-conspirator exception automatically complies with the requirements of the confrontation clause[5], or the rule that the declarant must be unavailable, unless the evidence is neither crucial to the prosecution nor devastating to the defendant[6], the testimony in dispute is admissible.

Appellants raise some additional arguments regarding the impropriety of jury instructions, the inadmissibility of lay witness opinion testimony, and the lack of substantial evidence on the record to prove they committed the crime charged in the indictment. These arguments lack merit.

Accordingly, the judgment of the District Court is affirmed.

ENTERED BY ORDER OF THE COURT
/s/ JOHN P. HEHMAN
Clerk

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[5] *United States* v. *Enright*, 579 F.2d 980, 990 n.9 (6th Cir. 1978), *United States* v. *Perna*, 491 F.2d 253, 255 (6th Cir.), *cert. denied*, 417 U.S. 934 (1974). But see, *Campbell* v. *United States*, 415 F.2d 356, 357 (6th Cir. 1969); *Phillips* v. *Neil*, 452 F.2d 337, 345 (6th Cir. 1971), *cert. denied*, 409 U.S. 884 (1972). See also, *United States* v. *Papia*, 560 F.2d 827 (7th Cir. 1977); *Ottomano* v. *United States*, 468 F.2d 269, 271 (1st Cir. 1972), *cert. denied*, 409 U.S. 1128 (1973), *reh'g denied*, 410 U.S. 948 (1973); *United States* v. *Clayton*, 450 F.2d 16, 20 (1st Cir.), *cert. denied*, 405 U.S. 975 (1972).

[6] *United States* v. *Peacock*, 654 F.2d 339 (5th Cir. 1981); *United States* v. *Fielding*, 630 F.2d 1357 (9th Cir. 1980), *reh'g denied and amended*, 645 F.2d 719 (9th Cir. 1981); *United States* v. *King*, 552 F.2d 833, 845-47 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977); *United States* v. *Snow*, 521 F.2d 730 (9th Cir. 1975), *cert. denied*, 423 U.S. 1090 (1976); *United States* v. *Puco*, 476 F.2d 1099, 1103 (2nd Cir.), *reh'g en banc denied*, *id.* at 1111, *cert. denied*, 414 U.S. 844 (1973), *citing United States* v. *Wright*, 588 F.2d 31, 38 (2nd Cir. 1978), *cert. denied*, 440 U.S. 917 (1979); *United States* v. *Kelley*, 526 F.2d 618, 620-621 (8th Cir 1975), *cert. denied*, 424 U.S. 971 (1976). See also, *United States* v. *Davis*, 578 F.2d 277, 281 (10th Cir. 1978).

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 82-5384, 82-5385

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JAMES E. MELHORN, ET AL.,
Defendants-Appellants.

ORDER

(Filed January 13, 1983)

Upon consideration of the appellants' motion to supplement the record on appeal or in the alternative to strike portions of the appellee's brief, And

Further considering the response in opposition thereto,
It is ORDERED that the motion be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
John P. Hehman, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 82-5384, 82-5385

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JAMES E. MELHORN, ET AL.,
Defendants-Appellants.

ORDER

(Filed February 17, 1983)

Upon consideration of the appellants' motion to extend time through May 23, 1983, in which to hold oral argument,

It is ORDERED that the motion be and it hereby is denied. The merits of the appeal can be argued without necessarily having consulted with appellants, where counsel on appeal was also trial counsel.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
John P. Hehman, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 82-5384, 82-5385

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JAMES E. MELHORN, ET AL.,
Defendants-Appellants.

ORDER

(Filed March 24, 1983)

Upon consideration of the appellee's motion requesting that this Court's order entered on March 8, 1983 be published, and

Further considering the response in opposition thereto,

It is ORDERED that the motion be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
John P. Hehman, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 82-5384/5385

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES E. MELHORN, and
THOMAS P. VANN,
Defendants-Appellants.

ORDER DENYING PETITION FOR REHEARING
(Filed May 13, 1983)

Before: KENNEDY and MARTIN, Circuit Judges; and HARVEY,* District Judge.

The Court not having favored rehearing en banc in the above case, the petition for rehearing is referred to our panel for disposition.

Upon consideration, IT IS ORDERED that the petition for rehearing be and hereby is DENIED.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

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* The Honorable James Harvey, United States District Court, Eastern District of Michigan, sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 82-5384/85

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JAMES MELHORN, ET AL.,
Defendants-Appellants.

ORDER

(Filed June 6, 1983)

ORDER STAYING MANDATE

ORDERED, That motion to stay mandate herein pending application to the Supreme Court for writ of certiorari is hereby granted and the mandate is stayed for thirty days from this date; provided that, if within such thirty days, the applicant shall file with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition, record, and brief have been filed, the stay shall continue until the final disposition of the case by the Supreme Court. Unless this condition is complied with within such thirty days or any extension thereof made by the Court or any judge thereof, or if the condition is complied with, then upon the filing of copy of an order denying the writ applied for, the mandate shall issue.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk
/s/ JOHN P. HEHMAN

EXCERPTS FROM VOIR DIRE AND PRE-TRIAL MOTION TRANSCRIPT

Transcript of Colloquy on Confrontation Clause Issue

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[550] THE COURT: I'll hear you on your second motion in limine.

MR. RITCHIE: If it please the Court, this motion is filed out of an abundance of caution simply to raise before we get into the matter of testimony, the question of the co-conspirators — any co-conspirators' statement the government intends to introduce. To simply point out that the evidentiary rule 801D2E on co-conspirators' statement is not equivalent to the confrontation clause.

Under Dutton versus Evans, the government has to make a further preliminary showing of the unavailability of the declarant.

THE COURT: Dutton versus Evans was decided prior to the adoption of the Federal Rules of Evidence. Does that make any difference?

MR. RITCHIE: I don't believe it does, Your Honor, because what the Federal Rules of Evidence in the co-conspirators exceptions simply embodies what had basically been case law prior to 1970 when Dutton versus Evans was —

THE COURT: Let me ask you something else, Mr. Ritchie. I think you're making what has been a common error in my own consideration of the hearsay rule [551] and the distinction that is now quite clear under the Federal Rules of Evidence. Rule 801 is not an exception to the hearsay rule. Rule 801 says these declarations are not hearsay. 801D2E does not constitute an exception to the hearsay rule. It simply says it's not hearsay.

Now that's different from the discussion by the Supreme Court in the High versus Roberts case which talks about a clear exception to the hearsay rule.

MR. RITCHIE: It simply is our position that some pre-

liminary showing must regardless of whether it is called an exception to the hearsay rule or whether it's –

THE COURT: Preliminary showing of what? You think unavailability has to be shown?

MR. RITCHIE: I think number one, unavailability has to be shown and beyond that if they show unavailability –

THE COURT: At least their trustworthiness.

MR. RITCHIE: They have to show the matter of trustworthiness and they have to show the testimony is not devastating to the defense; they have to show generally –

THE COURT: Any evidence that tends to [552] show guilt I would characterize as devastating, would you not, Mr. Ritchie?

MR. RITCHIE: I would except that perhaps in the situation in Dutton versus Evans where they had something like 19 witnesses to the facts themselves to the point that it was – the proof was overwhelming as to the guilt of the defendant. And the court there said it paled into legal insignificance.

THE COURT: Does it make any difference that here we are dealing with a crime which consists of the agreement and how do you prove the agreement except by the declarations of it – whether verbal or non-verbal declarations of the alleged co-conspirators?

MR. RITCHIE: We submit, Your Honor –

THE COURT: The essence of the crime is the declaration.

MR. RITCHIE: Your Honor, the witness – I'm sorry.

THE COURT: Go ahead.

MR. RITCHIE: The witnesses who would have had primary contact with the defendants in this case, witnesses whom we have been led to believe are actually going to be here and on the witness stand, we're concerned about the statements of some other possible co-conspirators who have had primary dealings – not with these defendants [553] but with the government witnesses.

THE COURT: Give me an example of what you anticipate.

MR. RITCHIE: Mr. Edmond Pendleton, Your Honor, in the matter of purchasing or selling to Interstate Paving Company a silo and the effect of that agreement between Mr. Pendleton and Mr. Riddle and Mr. Fugate wherein apparently they agreed to purchase a silo, allegedly to keep the Pendletons off 8175.

The proof will show that though there may have been some discussion about the possible purchase in the presence of one of these defendants that the agreement as it related to 8175 if there was in fact one at that time when neither of these defendants were present. And so if they start quoting as a declarant, Mr. Edmond Pendleton as that part of the agreement that related to 8175 and the Pendleton's staying off –

THE COURT: Who will be testifying with respect to the alleged declaration?

MR. RITCHIE: Mr. Riddle and Mr. Walter Richardson, III, we anticipate, Your Honor and Fugate also.

THE COURT: And they conducted a conversation with Mr. Pendleton?

MR. RITCHIE: That's correct, Your Honor.

[554] THE COURT: They'll be testifying that statements were made by Mr. Pendleton?

MR. RITCHIE: That's correct, Your Honor.

• • • •

THE COURT: What do you say, Mr. Burley?

MR. BURLEY: As I read the motion in limine, Your Honor, I believe that the defense has completely misread the case of High versus Roberts.

[555] THE COURT: I can't stand that noise. See if you're standing on the wire.

MR. BURLEY: No.

THE COURT: All right. Turn it off. Go ahead.

MR. BURLEY: With respect to the defendant's reading of the Supreme Court 1980 decision of Ohio against Roberts, in the lawyers' edition at page 608, the court expressedly recognizes that reliability can be inferred without harm on

a case where the evidence falls within a firmly rooted hearsay exception.

Your Honor pointed out, of course, under the Federal Rules of Evidence co-conspirators' statements or statements by the party deponent, are deemed so reliable they are not even exceptions to the hearsay rule, they are just plain not hearsay, which is a very simple backward step to make.

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EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

Transcript of Colloquy and Ruling on Confrontation Clause Issue

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[118]

All right, ladies and gentlemen, step back into your jury room for a few minutes.

(Whereupon, jury left courtroom.)

All right, Mr. Burley, your question was what did Mr. Pendleton say to Mr. Fugate?

MR. BURLEY: Yes, sir.

THE COURT: And this was on a telephone call or in the meeting in Mr. Pendleton's room?

MR. BURLEY: Subsequent telephone call.

THE COURT: Is Mr. Pendleton going to be a witness?

MR. BURLEY: I don't believe so, Your Honor.

THE COURT: All right. Let me hear it. Let me hear the answer. What happened, Mr. Fugate?

THE WITNESS: Subsequent telephone call that evening, we bought the piece of equipment from Pendleton and in return for a complimentary bid on Contract 8175. I gave him the number to bid and that is the number he bid.

THE COURT: And this was a follow-up and conclusion of the deal he had suggested when you and Mr. Vann and he were in the room?

THE WITNESS: That was the conclusion, [119] yes, sir.

THE COURT: That just tied it up. It had been suggested by Mr. Pendleton in the room while you and Mr. Vann were in there. If you all would buy the equipment –

THE WITNESS: I don't think Mr. Pendleton made that suggestion. I don't think Mr. Pendleton made that suggestion but that is what happened.

THE COURT: All right. Was that suggestion made by anybody?

THE WITNESS: I can't recall whether it was or wasn't exactly. I don't know. I don't recall that much about it.

THE COURT: Go ahead, Mr. Burley. Does that complete the examination you want about this?

MR. BURLEY: Yes, Your Honor, that will be it.

THE COURT: Anybody want to –

MR. BURLEY: Other than to ask if Pendleton in fact submitted a bid as he requested.

THE COURT: At the price you suggested?

THE WITNESS: Yes, sir. Yes to both of those questions.

THE COURT: Gentlemen, I think that is [120] the clearest kind of 801DQE kind of co-conspirator type testimony and I'm going to give you a chance to take this to the Supreme Court and let them bite the bullet between the federal rules of evidence and the confrontation clause. I think that is the clearest kind of co-conspirator statement and I will let it in.

Bring the jury back in, Mr. Marshal. Your objection is overruled.

(Whereupon, jury entered courtroom.)

Counsel, approach the bench.

(At bench.)

In further explanation of the Court's ruling on this, I am not for closing you from making the same objection again to other testimony but in further explanation of the Court's ruling on this particular testimony, I think there is an issue necessary of truthfulness in this that appears from the fact that Mr. Vann was present at the time that the proposition

was first discussed over who was going to – how they were going to get Mr. Pendleton off this job and this was the conclusion of it and further corroborated by the fact that they submitted the bid in the amount suggested. I want that in the record for further explanation of the Court's ruling.

MR. RITCHIE: Can I put something in [121] the record to clarify it for Justice White?

MR. MONROE: Mr. Edwards first.

MR. RITCHIE: Whatever. In any event, we would point out that the government has not made an effort to make a showing of good faith or otherwise of the unavailability of Mr. Pendleton.

THE COURT: That is true.

MR. RITCHIE: And secondly, that his testimony does not reflect that the suggestion of the – contain any basis to find there was a suggestion of trade-off of the silo for the bid while the defendant Vann was in the room.

THE COURT: That is clear inference this Court draws from it and any other inference may be possible. That is clear inference this Court draws from it. I don't know what the jury is going to do. I draw it.

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Trial Transcript of Colloquy and District Court's Final Ruling on Uncharged Bad Acts

• • • •

[671] THE COURT: Pass it in.

All right, Ms. Sasamoto and gentlemen, before Mr. Hamil testifies, the Court intends to instruct the jury as follows: I am reading it to you now and then I will hear you if you wish to make any additions or changes.

Ladies and gentlemen, you will recall that the Court has previously admitted testimony from [672] Mr. Summers and Mr. Pope with respect to the alleged rigging or setting up of other contracts other than Contracts 8148 and 8175 which are the subject of this indictment.

I cautioned you at the time that you should consider this evidence for a very limited purpose. The Court is now about to permit the testimony of Mr. Hamil in a similar vein and I will instruct you again and further as to the purposes for which you may consider this evidence as well as that of Mr. Summers and Mr. Pope.

First, ladies and gentlemen, you must remember that the evidence of the commission of another crime is never evidence that these defendants Vann and Melhorn committed this particular crime charged in the indictment.

Such evidence of a prior wrongful act may not be considered by the jury as proof of a character trait of criminality or predisposition to crime. And that the defendant acted in conformity to such character trait or predisposition.

For instance, it would be totally improper for the government to prove a person had stolen something on a former occasion as proof of a charge that that same defendant stole something on a subsequent [673] occasion.

However you may consider the testimony of Messrs. Hamil, Pope and Summers on the question of the specific intent of Mr. Vann or Mr. Melhorn or both.

One of the essential elements of the crime charged here that is, an agreement or conspiracy to restrain trade is the intent to restrain trade or limit competition. The element of intent need not be so specific as to require demonstration that the conduct was undertaken with the conscious object of producing anti-competitive effects. It is sufficient that the conduct be shown to have been undertaken with knowledge that the proscribed anti-competitive effects would most likely follow from the agreement and conduct.

Intent is a state of mind and knowledge of the probable anti-competitive effects of a given action is also a state of mind.

You must first find beyond a reasonable doubt from other evidence other than that or prior criminal acts that the defendants Vann or Melhorn or both agreed to certain conduct with regard to Contracts 8148 and 8175. You may then consider the evidence of Messrs. Pope, Summers and Hamil giving it such weight as you think it deserves on the question

of whether Mr. Vann or Mr. Melhorn or both had the necessary intent.

[674] MR. BURLEY: Your Honor, I think it was about the second to last sentence. I think what we want to establish here is the intent to agree.

THE COURT: Mr. Burley, If you will recall from the Gypsum case, footnote 8B, –

MR. BURLEY: Yes, sir, I'm familiar with it.

THE COURT: – in which the majority of the court spelled out that there were two kinds of intent.

MR. BURLEY: Yes, sir.

THE COURT: One, intent to agree; the other, the intent to bring about the anti-competitive effects.

Now, if it is admitted on the first of those two – as you recall the court in Gypsym limited it to the second of those two types of intent. If it is on the intent to agree, that gets to whether or not there is an agreement and an agreement is the essence of a crime. That gets awful close to the Phillips case, Mr. Burley, commission of a prior offense is the equivalent of the commission of this offense or that the defendants acted in conformity with the previous conduct.

MR. BURLEY: I think Phillips is the case that I – was first referred to this morning so I rushed [675] out and read it. It seemed to me in Phillips the issue was not one of intent at all but one of identity.

THE COURT: It was but proof of prior act. Identity is one of those listed exceptions to 404B in the same way. I –

MR. BURLEY: We believe that similar acts are particularly appropriate in intent-type cases.

THE COURT: Well, I think they are, too, Mr. Burley, and that's the reason I admitted it. But it gets to be a very sophisticated kind of distinction as to whether or not the agreement itself which is the essence of the crime, can be proved by prior agreements.

MR. BURLEY: It can be –

THE COURT: Now the required intent to bring about the prohibitive acts in this case, Mr. Burley, for example: I think your evidence of prior criminal bid rigging is highly relevant and is exactly what 404B contemplated.

If the defendants are saying that we made the agreement but, you know, we had no intent to restrain competition or limit bids. We made an agreement to do certain things. Then that is where your prior knowledge once again drawing from the Gypsum case, the knowledge of the probable anti-competitive effects could and logically should follow from previous bid rigging where [676] they knew that the anti-competitive effect was existent. When it gets to the essence of the crime – that is the agreement, the first hurdle – I think they have to infer that from other circumstances.

Once again, it is a state of mind. They would infer that from other circumstances surrounding it but I'm reluctant to let them take into consideration the fact that they had agreed to prior criminal acts. That gets awfully close to convicting for trait of character or predisposition of criminality. That is what is bothering me, Mr. Burley. I will give you a chance to talk. You sit down.

MR. RITCHIE: I'm sorry.

MR. BURLEY: If I understand the defense, Judge, it is that they happened to be present and they happened to have conversation with Fugate and Riddle and others but they didn't agree and they didn't intend to agree and –

THE COURT: Of course, you are – your closing argument is going to be they did precisely what they agreed to do and that is evidence of an agreement, Mr. Burley.

MR. BURLEY: Certainly.

THE COURT: And you'll prove that by facts and circumstances and inferences other than the [677] inference from the commission of a former act that they did this act.

MR. BURLEY: That's true, Judge, but the fact they did similar things and said similar things on different occasions with different people would negate the inference that they were merely present and didn't intend to agree on this occasion.

THE COURT: Well, this is a fairly sophisticated fine line I'm attempting to draw here but I think it's appropriate, Mr. Burley.

The knowledge of the – on the question of the knowledge of the anti-competitive effects or knowledge of the probable anti-competitive effects I think certainly can be inferred from prior bid riggings where they knew what happened as the result there as well as some other facts and circumstances which you may prove or perhaps have already proved.

Beyond that, I'm reluctant to go, Mr. Burley.

MR. BURLEY: The Gypsum case involves something like telephone calls for price verification to avoid violations of the Robinson Patman Act –

THE COURT: Yes. In that case the defense was that they had the telephone calls; that they did everything that they were accused of doing – it was [678] just that they were doing it for a different purpose. They were doing it to comply with Robinson Patman rather than to produce an anti-competitive effect and the prior acts – analogizes to this case.

MR. BURLEY: If the only defense that the defendants want to make is that yes, we had these conversations but we were innocent, we were going to joint venture the subcontract, it is similar to Gypsum. But I understand their defense to go beyond that.

THE COURT: We don't know at this point what their defense is but from the Voir Dire and opening statement and cross-examination, I think part of their defense is going to be the mere presence is insufficient. Now, of course, you have substantially more than mere presence, Mr. Burley, already in the record.

You have overt acts in furtherance, for instance, not necessary to proof of a Sherman Act conspiracy because the conspiracy itself is the crime and overt actions are not required.

I will charge the jury to that effect, gentlemen. If you have any contrary thinking on that you can tell me about it. In my opinion of the law, an overt act is not necessary in a Sherman Act conspiracy. The conspiracy – the agreement itself is the crime in [679] what is prescribed by the law.

MR. BURLEY: We also have actual speaking words of agreement.

THE COURT: You have other things from which the jury

may infer and you may argue, of course. But all I'm suggesting to you at this time and I'm actually throwing it out for argument – I will listen to both of you on this. I have over the lunch hour and during the examination of Mr. Lewis Evans, I have been thinking about this and I have come up with this – I hope not sophistry but perhaps sophisticated distinction between the two types of intent.

I will hear you both on that.

MR. RITCHIE: May I –

THE COURT: All right.

MR. RITCHIE: Your Honor, it is exactly the dichotomy between the two types of intents discussed in Gypsum which is the basis for the objection which I tried to state before and I'm sure that I did not do so with sufficient –

THE COURT: I don't think you suggested this distinction, Mr. Ritchie. If you did, it went over my head.

MR. RITCHIE: I'm not sure I fully understood the distinction. I'm sure I didn't express it [680] well, but I did say I believe – or at least I tried to say that our defense is not that we lacked an intent either to agree or lacked an intent to restrain trade. I've not mentioned that because frankly, that was the furtherest thing from my mind. I understood Gypsum indicated they didn't have to show intent to restrain trade, simply knowledge.

THE COURT: Well, that is a form of evidence of intent. Gypsum just said that you don't have to demonstrate specific intent to the extent that you have to prove a guilty, malicious, willful kind of intent on the part – but it is sufficient for the purposes of Gypsum to prove a knowledge of the probable anti-competitive effect.

Now, the government has to prove anti-competitive effects – under this theory, they have to prove the agreement and then it is sufficient to prove –

MR. RITCHIE: Intent to agree.

THE COURT: No, not intent to agree. Intent in terms of knowledge of the probable anti-competitive effects. Now, that's the intent that it necessary to violate the Sherman Antitrust Act, to produce a restraint of trade.

Now, the intent to agree – let me pursue the distinction a little bit more. They could have [681] an intent to agree to what they thought was an innocuous agreement and have no knowledge of the probable anti-competitive effects of this alleged innocuous agreement.

MR. RITCHIE: Our defense is –

THE COURT: Do you want to tell me what it is? You don't have to but you may tell me now what it is.

MR. RITCHIE: I think I said it last Monday. I think our defense it – I know our defense is that we simply did not agree. We did not commit the act of agreement. If I understood what Your Honor indicated a moment ago, the issue upon which the jury could consider this prior act testimony was whether or not we had the intent, I suppose –

THE COURT: To produce an anti-competitive act.

MR. RITCHIE: Exactly. Let me say as clearly as I can, Your Honor, that is not our defense, speaking on behalf of Melhorn at all. And since it is not our defense, the prior act testimony should not come in before this jury. I think the Court has correctly stated that if it is to be considered that it would have to be on ths issue, if that's the defendant's defense. But I respectfully suggest to the Court that it's not and since it's not, the evidence can't come in.

[682] In all the preparation since early on, I never even gave any thought to defending on the basis of a lack of intent to have the restraint aspect of it carried forward – brought out – accomplished. It has simply been on the basis that we didn't agree.

Stan Fugate, Carl Riddle may have agreed among themselves, swept us along without us entering into into any agreement. We didn't agree and therefore we're not guilty.

So that I suggest to the Court under the analysis of the law of prior acts carries the Socratic logic forward to the conclusion that the jury should not hear prior act testimony. That's not the issue. I sincerely believe that.

THE COURT: Mr. Burley? Excuse me. Mr. Monroe, do you want to be heard?

MR. MONROE: I can't add much, Your Honor, except our

basic defense for Mr. Vann is as Mr. Ritchie articulated it. We did not agree to the charge set forth in paragraph 13 of the indictment. It was a very specific type of agreement set forth there and Tom Vann didn't agree to that. He wasn't a part of that particular agreement. I think you sort of summed it up in your charge when you said it was drawing a very sophisticated line. I would judge from what I have heard [683] so far this afternoon some of the lawyers here are having difficulty in making some of the distinctions here and I think without looking at the charge that I would think that charge would be confusing to the jury and I think we – basically our position is that we object to the introduction of this additional evidence and I think – carrying that forward, I think at least at this point I would have to object to the charge, too.

THE COURT: Mr. Burley?

MR. BURLEY: Well, I guess there are two things to be said, Your Honor. First is I think I correctly perceived Mr. Ritchie's defense but he does have a second step to it if he is going to put on Mr. Allen and Mr. Jenkins to try and prove that the agreement was not successful.

THE COURT: It doesn't have to be successful and I'll tell the jury that.

MR. BURLEY: With their intent to restrain trade.

THE COURT: I'm going to tell the jury it doesn't have to be a successful conspiracy. It doesn't have to accomplish the objective. The mere agreement to do it, to produce an anti-competitive effect is the evidence of the crime, whether it is successful or falls flat on its face. And, you know, if you object to the [684] relevance of Mr. Allen on that basis I may give the jury that kind of instruction at that time. Because Mr. Allen coming in here saying that he didn't agree to it and he never – and he intended to bid it hard all the time, he is not an essential member of the conspiracy if Ashland-Warren and Interstate and anybody else entered into it – Pope, Summers. That's sufficient Mr. Allen doesn't have to be a member of the conspiracy and you don't have to prove every charge in your bill of particulars as long as you prove sufficient numbers of them to constitute the element of a crime.

I'm not sure the testimony of Mr. Allen is even relevant.

MR. BURLEY: Well, we have come whole circle. We have to prove that there was an agreement and they are defending on the grounds that there wasn't an agreement and they didn't intend to agree and we certainly would like to argue the similar acts as demonstrating they did in fact have that intent to agree and did agree and the significance of the Gypsum case in my judgment is it's most recent denunciation by the Supreme Court that a good showing of intent is required in Sherman Act cases such as this before you convict. And as you know, we've all amended all our jury instructions to add an extra element of the intent [685] as the result of that decision. It is to meet that that we want to use similar acts.

THE COURT: The main thrust of Gypsum is that you cannot – it struck out the old jury instruction about presuming intent from an anti-competitive act. That was part of the Devitt and Blackmar instructions up until Gypsum.

MR. BURLEY: I have a case that if I could just cite to the Court:

THE COURT: Yes.

MR. BURLEY: Because I think it's –

THE COURT: I'm looking for all the help I can get.

MR. BURLEY: It was historic in leading cases on the subject where intent is an issue. That case is Krogmann against the United States 225 fed 2nd; 220 at 228, Sixth Circuit 1955.

Prior transactions on the part of a defendant in a criminal case similar to the one involved in which the element of intent is an issue has a bearing upon the issue of intent and are admissible in evidence for the purpose of proving or disproving the necessary intent.

And then I think the more recent Sixth Circuit cases probably have already been brought to the [686] Court's attention, court mentioned U.S. against Semak, 536 fed 2nd, 1142, Sixth Circuit 1976. U. S. against Grimes –

THE COURT: And that was decided before the federal rules of evidence or they didn't mention it in 404B in Semak. They decided it in line with 404B but didn't mention it.

MR. BURLEY: But I think the federal rules carried forward –

THE COURT: To common law.

MR. BURLEY: United States against Grimes 620 fed 2nd, 587, Sixth Circuit 1980, found no abusive evidence admitting evidence of similar crimes engaged in by the defendant in order to negate his claim of lack of criminal intent.

If I could go on I could cite the Seventh Circuit cases but I think that's a well-accepted proposition. We found a Second Circuit case called United States against Williams. I put the book back on the shelf where the defense had merely been being present wasn't an indicator of intent.

THE COURT: In a conspiracy charge?

MR. BURLEY: Yes, Your Honor. Cross-examination in a conspiracy case.

THE COURT: Seventh Circuit?

[687] MR. BURLEY: Second Circuit.

THE COURT: Give me that citation.

MR. BURLEY: We'll get it for you, Judge.

THE COURT: You don't have it?

MR. BURLEY: I don't have it in my pocket but I can get it in a couple minutes.

THE COURT: All Right. Get it in a couple minutes and bring it back. We'll take a recess.

(Whereupon, court was recessed.)
(Whereupon, court was resumed.)

THE COURT: Gentlemen, none of the cases you furnished the Court have been really instructive for this reason. In all of the cited cases there has been involved an act which was only criminal in nature if it was done with the requisite mens rae.

So mens rae was concomitant to an act. Here, the mens rae is the essence of the crime. No overt act is necessary in a Sherman Act conspiracy. It is the agreement in restraint of trade which is proscribed.

So, I cannot escape the conclusion that proof of entertaining the necessary intent – proof of becoming a part of a

conspiracy on a prior occasion [688] invites the inference that the requisite mens rae was present on this case. It gets awful close to proving someone committing a robbery on one occasion as being evidence of the fact that the person committed a robbery on the second occasion.

And although it would seem to be patently relevant, highly relevant — of state of mind, you can look at it from the other side and say suppose Mr. Melhorn walked out of the discussion with Mr. Vann and Mr. Fugate and said to himself or to the trees, I'm not going to do this.

Then proof of the participation in other conspiracies would, if admitted, lead to the possibility of conviction on this occasion for other crimes. It's a very troubling sort of thing and I can't find any instruction in the precedents. On the other hand, now, let's stop right there before we go to the other hand. Let's stop right there.

If the Court is right in that rationale, it would require the government to prove the entry into the agreement by other evidence and other crimes evidence, inferences from what was said in the conversations, inferences from overt acts in furtherance of the alleged conspiracy and from all the facts and circumstances of that particular series of events without consideration of [689] other crimes.

On the other hand, under the Gypsum case in order for the act to be criminal it must require more than an agreement; it must be an agreement in restraint of trade and not only must it have an anti-competitive impact or effect, the defendant must have known the probable anti-competitive effect of the agreement.

Now, the defendants say that they haven't raised that and under the United States versus Ring in the Sixth Circuit, admission of other crimes evidence on the element of intent that has not been raised as a defense is more prejudicial than probative.

I cannot agree that the defendants have not raised that. They may say they haven't raised it but in fact they have. There has been vigorous cross-examination on whether or not this was in fact a discussion to rig bids or merely to allocate

the work to the competitor closest to the job who had the shortest haul, and whether or not the discussion with Mr. Allen was an innocent subcontracting, straight business deal for which there is no criminality attached or whether this was all in furtherance of the original conspiracy to keep Mr. Allen out of Sullivan County, keep him from setting up an asphalt plant in Sullivan County and furnishing [690] competition in the future.

In other words, the place that the Court is coming to is the place that the Court was before the recess, that the government will be required to prove the agreement by the facts and circumstances surrounding the alleged agreement and Mr. Melhorn's or Mr. Vann's or both of their entry into that agreement.

Having proved an agreement beyond a reasonable doubt, the jury will be instructed that having found the existence of an agreement beyond a reasonable doubt that they must also find beyond a reasonable doubt that the agreement had any competitive impact or effect and furthermore that the defendants Vann and Melhorn knew of the probable anti-competitive effect of the agreement.

Upon the latter evidentiary requirement, the other crimes evidence becomes highly relevant if the defendants Vann and Melhorn entered into other conspiratorial bid rigging in order to obtain an anti-competitive effect, then that is highly relevant to the question of whether or not the present agreement – the jury having found the existence of such an agreement beyond a reasonable doubt – that Mr. Vann and Mr. Melhorn entertained the requisite knowledge of the probable anti-competitive effect of such a proven agreement.

[691] Now, gentlemen, that may be as the Court suggested earlier, an exercise in sophistry. I don't think it is because as I say, I think this type of conspiracy, Sherman Act conspiracy is **sui generis.**

Every other conspiracy requires proof of an overt act. Now, that in itself is a safety guard. Requiring proof an an overt act eliminates the problem I spoke of a moment ago. That is the innocent presence at a discussion and a later decision that

I'm not going to go along with it. Because of proof of an overt act and the defendant's acquiescence therein or participation therein is a protection against conviction of an innocent alleged conspirator.

Here, the essence of the crime is the agreement to restrain trade. So, the Court will try to make the jury understand the government must first prove beyond a reasonable doubt the existence of an agreement and that the defendants' participation in the agreement – agreement thereto – willingness to go along there with may be inferred from all the facts and circumstances surrounding the particular agreement.

Thereafter, the government must prove that the agreement had an anti-competitive effect and the government must go further and prove that the defendants Vann and Melhorn knew the probable anti-competitive [692] effect on this, the other crimes, other conspiratorial bid rigging are highly relevant in terms of the knowledge that the defendants may have had.

The Court has considered the other available evidence that the government might have on this point and finds this evidence to be the most relevant and perhaps only available evidence on that particular state of mind of the defendants Vann and Melhorn and further has conducted the balancing test required by 403 of the rules of evidence and finds this evidence to be of such a probative value that it far outweighs any potential prejudice that may result.

Does everybody understand the ruling of the Court?

MR. RITCHIE: May I make one comment for the record, though?

THE COURT: Yes, sir. Do you want to renew your motion for a mistrial?

MR. RITCHIE: Twice. Let me make one comment. I really don't think I will have any disagreement with the government on this although they know a lot more about the Sherman Antitrust Act matters than do I. Unless I am badly mistaken, the charge of bid rigging is a per se Sherman Act violation and when the charge is bid rigging, the government need not show

knowledge [693] of anti-competitive effect of the type shown in Gypsum.

If I am correct and I'm in the presence of the Court and counsel on both sides who know a lot more about Sherman Antitrust Act matters than I do, but if I am correct, then the analogy would break down I think.

THE COURT: Mr. Ritchie, if you characterize it as a price fixing agreement, you are correct in that certainly in a civil action it is a per se violation. It is unreasonable per se. However, doesn't that border on the type of presumptions that the criminal law has now discarded that – for instance, the presumption of sanity. There is no longer a presumption of sanity once it is fairly raised. And the very thing that the Gypsum case addressed that the jury. – I think the government has to prove that this has an anti-competitive effect.

MR. RITCHIE: Your Honor may be right. For the record, however, I will renew my motion for a mistrial.

THE COURT: Proof of any essential element of any crime beyond a reasonable doubt is now the rule. It has always been thought to be the rule but we sort of glazed over some of those areas of legal presumptions and they no longer exist in the criminal law [694] as I understand it.

MR. RITCHIE: Far be it from me to be in favor of presumption in a criminal case. I have always been against those.

THE COURT: Presumption works against the defendant.

MR. RITCHIE: That's exactly right, sir.

THE COURT: You are in favor of presumption rules?

MR. RITCHIE: Well, there are certain ones I am in favor of. We would wholly renew our motion for mistrial at this time, Your Honor.

THE COURT: All right. Mr. Monroe.

MR. MONROE: I will make mine short, Your Honor.

It seems to me that the effect in any agreement is going to be peculiar to the set of facts that it involved in a litigation. I think if this indictment or this agreement alleged in the indictment proves or develops an effect on competition, it is because of the facts of this case. I don't think that what hap-

pened somewhere else at some other time has any relevance as to what the effect might be here. It seems to me —

[695] THE COURT: Mr. Monroe, I don't want to cut you off but it seems to me although there may be differences in the fact situations between the setting up of the Hamlin County job or the setting of 8195 or 7795, the upper end of the interstate of the setting up of the June bidding of 1979 to which Mr. Hamil will testify, there may be some mechanical differences in the way that it was done but the net effect of all of them was to complementary bid to establish a price, to allocate work and to eliminate competition. Although there may be mechanical difference, the effort is the same and it is the willingness to bring about that effect and the knowledge that that was the probable effect that the government has to prove and on which I'm allowing this evidence.

MR. MONROE: Your Honor, I don't think they have to go to another act to prove that. It seems to me that that is the basis of the bottom line on your reasoning that they have to go to some other county, some other job —

THE COURT: Mr. Monroe, you have through your cross-examination, the inference of your questions or the inference at least the Court has drawn from some of your questions, has been that this whole business on 8148 and 8175 was entirely innocent; that Ashland-Warren [696] had the plant that was nearest to 8148 so this was simply a businessman's decision; they discussed it and said Ashland, you're the logical person to get that bid.

And on 8175, Interstate had the nearest plant and so as honorable businessmen who are neighbors and go to parties together, we are not allocating work, we're just recognizing reality. You have got the closest plant so you get that job and we're not going to bother you on it.

It's not eliminating competition, we're just recognizing reality. It costs us 12¢ a ton mile to haul this asphalt and we have a large haul distance of 20 miles and you have an average haul distance of 9 miles so you go on and bid that job and if you want us to stick in a bid, we will. But it's innocent;

we are not trying to allocate your work or rig any bids or set any prices. We're just recognizing reality.

MR. MONROE: That isn't quite the case, Your Honor.

THE COURT: Sir?

MR. MONROE: That isn't quite my case.

THE COURT: Well, you have certainly left that inference from some of your rather vigorous cross-examination.

[697] MR. MONROE: Certainly my case is that 8148 is innocent.

THE COURT: You'll take any figure they'll buy.

MR. MONROE: I'm stronger on some but not the others.

It just doesn't seem to me that without developing a similar set of facts in a different county that's going to prove anybody's intent at all.

I don't think you can transfer a person's intent from one job to somewhere else to this situation.

THE COURT: It's not so much the question of intent as it is the knowledge of the effect of the anti-competitive effect which the Supreme Court in Gypsum equated with intent. It was a lesser standard than specific intent to willfully violate the law.

It said knowledge of anti-competitive effect is tantamount to intent, criminal intent in a Sherman Act case. That's the way I read Gypsum in footnote 8B.

MR. MONROE: Well, I just disagree with you, Your Honor, on the basis that intent from job outside the county be transferred into 8148 to show that 8148 had any effect on competition whatsoever.

[698] THE COURT: Well, knowledge of the effect of an agreement can be transferred. This is what this Court is holding.

MR. MONROE: I think you and I disagree on that.

THE COURT: Well, gentlemen and Ms. Sasamoto, I have thought about this a long time. I may have come down with the wrong result and if I have the Sixth Circuit will be quick to advise me.

Yes, Mr. Burley?

MR. BURLEY: Might I put the citation of the Williams case in the record?

THE COURT: Yes, sir, I read your Williams case. The Williams case as Court stated in the outset involved a bank robbery or bank larsony and intent was concomitant element of the crime. I think it is distinguishable on that ground. That's the Second Circuit case you're talking about, United States versus Williams in the Second Circuit.

Mr. Burley: 577, fed 2nd, 188.

Second point if I could, Your Honor. The government proposes the per se instruction in its proposed instruction no. 21 and the elements of the offense are set forth in instruction no. 15 and the fourth element of the offense in that instruction is [699] extract the Gypsum instruction you just mentioned.

I want to point that out to meet what Mr. Ritchie just said, to point out the fact that we all understand that under Gypsum the government has to either prove a general intent to agree an anti-competitive effect or a specific agreement that affects neither here nor there.

THE COURT: Well, the Court takes some consolation in the fact that neither side agrees with me. That might be indication of the rightness of my position.

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CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

U.S. Constitution Amendment VI provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . . and to have the Assistance of Counsel for his defence.

Section 1 of the Sherman Act, as amended, 15 U.S.C. § 1, provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is hereby declared to be illegal.

Federal Rule of Evidence 404(b), 28 U.S.C. Federal Rule of Evidence 404(b), ("F.R.E. 404(b)") provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Federal Rule of Evidence 801(d)(2)(E), 28 U.S.C. Federal Rule of Evidence 801(d)(2)(E), ("F.R.E. 801(d)(2)(E)") provides in pertinent part:

> A statement is not hearsay if . . . the statement is offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 82-5384, 82-5385

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JAMES E. MELHORN, ET AL.,
Defendants-Appellants.

ORDER

(Filed July 6, 1983)

Upon consideration of the appellants' motion for a further stay of mandate pending application for writ of certiorari,
It is ORDERED that the motion be and it hereby is granted.

ENTERED BY ORDER OF THE COURT.

/s/ JOHN P. HEHMAN
John P. Hehman, Clerk